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IN THE
Supreme Court of the United States

SALVADOR MAGLUTA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Ashe v. Swenson*, 397 U.S. 436 (1970), allow the government to use a hypothetical factual explanation for a second trial verdict in order to avoid the collateral estoppel effect of a prior acquittal?

2. May a federal court sentence a defendant for conduct for which the government tried and failed to obtain a valid jury verdict?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Salvador Magluta respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's most recent opinion is unreported, App. 1a-16a, but can be found at 2008 WL 2303508. Its earlier decision, App. 17a-51a, is reported at 418 F.3d 1166. The relevant order of the District Court, App. 55a-59a, is unreported.

JURISDICTION

The Eleventh Circuit issued its decision on June 5, 2008. App. 1a. A timely petition for rehearing was denied on August 5, 2008. App. 60-61a. Justice Thomas extended the time for filing a petition for a writ of certiorari until December 3, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides, in relevant part, that "No person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment of the Constitution provides, in relevant part, that "the accused shall enjoy the right to a . . . trial [] by an impartial jury of the State and district wherein the crime shall have been committed."

STATEMENT

In 1991, the government prosecuted Petitioner on two dozen drug-related counts. A jury acquitted him of all charges. Undeterred, the government brought a set of new charges against Petitioner—some of which required the government to prove as elements of the offenses the *same* conduct for which the first jury acquitted him. The district court, over Petitioner's double jeopardy and collateral estoppel objections, allowed the government to pursue these charges. The second jury again acquitted Petitioner on many, although not all, of the additional charges.

Unwilling to accept the first jury's across-the-board acquittal and the second jury's acquittal on many of the charges, the district court sentenced Petitioner as if he had been found guilty of all of these crimes. Had the district court sentenced Petitioner based on the *facts found beyond a reasonable doubt by the jury*, the high end of the sentencing range (for the crimes of laundering $730,000 and obstruction of justice) would have been under 20 years. Instead, relying on the government's unproven charges that Petitioner actually laundered $35 million and committed other violent crimes to boot, the district court imposed a 195-year sentence—approximately *ten times* the high end of the range authorized by the jury's verdict.

This case therefore presents in unusually stark relief two pressing questions regarding the ability of courts to punish defendants for conduct for which the government previously unsuccessfully prosecuted them.

1. In 1991, the government indicted Petitioner on twenty-four drug-related counts for operating a continuing criminal enterprise from January 1978 to April 1991 to import and distribute illegal narcotics. App. 19-20a. During a four-month trial in 1996, the government called dozens of cooperating witnesses and presented hundreds of documents. The government's case encompassed every drug offense that Petitioner had allegedly committed and every dollar he had allegedly earned therefrom.[1] Moreover, the government argued that money laundering activities were "part and parcel" of the drug charges. 1996 Trial Tr. at 9208, 11063-64. Ultimately, the district court granted judgments of acquittal on seven of the counts, and the jury acquitted Petitioner on all remaining counts. App. 19a.

2. In 1999, the government indicted Petitioner again. This time the government charged him with laundering drug proceeds, obstructing justice at the previous trial by bribing a witness and a juror, and related conspiracy counts. In order to convict Petitioner of money laundering, the government had to prove the following elements beyond a reasonable doubt: (1) Petitioner conducted, or attempted to conduct, a financial transaction (2) that involved the proceeds of a statutorily specified unlawful activity, (3) which he knew were proceeds from some form of illegal activity, and (4) that he engaged in the transaction knowing it was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds. App. 21a n.2 (listing elements

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[1] At the trial, Petitioner maintained in his defense that, while he had engaged in illegal drug activity in the past, he had ceased all such activity by 1980. App. 21a n.1.

of money laundering under 18 U.S.C. § 1956(a)(1)(B)(i)). Both the conspiracy and substantive money laundering offenses charged that the funds involved in the alleged laundering were the proceeds of specified unlawful activity, i.e., the receiving, concealing, buying, selling, and otherwise dealing in a controlled substance.

Petitioner moved to dismiss the counts of the indictment charging money laundering and related conspiracy, arguing that his acquittal on all charges in 1996 established that he had not committed drug offenses during the time in which the specified unlawful activity in this case occurred. App. 20a, 56a. The magistrate judge recommended denying Petitioner's motion to dismiss. The district court adopted the magistrate judge's report and recommendation, stating that, even if the first jury determined that Petitioner did not commit drug offenses, the government could still proceed because, for the money laundering charge, the government simply "must prove that the proceeds used in the financial transactions were derived from narcotics trafficking and that [defendant] knew that this was the source of the funds." App. 57a. The government does "not need to prove that the defendants [sic] own drug trafficking activities produced the proceeds." *Ibid.*

3. Petitioner brought an interlocutory appeal of this order to the Eleventh Circuit. The government argued that establishing guilt on the money laundering charges would "not require [it to] prove that the funds were the proceeds of narcotics trafficking by *Appellant*[]." Gov't Br., No. 00-16505

(emphasis in original), *available at* 2001 WL 34149079, at *19. The Court of Appeals denied Petitioner's interlocutory appeal without prejudice, reasoning that his collateral estoppel claim was premature because "[a] finding that the defendant[] did not [himself] engage in cocaine trafficking offenses after any particular date would not preclude a finding that [he] laundered the proceeds of controlled substances, and conspired to do so, as charged in the present indictment." App. 53a. The court "impl[ied] no view" as to whether collateral estoppel would apply if the government ultimately argued at trial that Petitioner himself trafficked cocaine between 1980 and 1991. App. 53a-54a.

4. After remand, the case went to trial. The government not only used the same evidence to prove "unlawful activity" as it unsuccessfully offered in 1996, but its direct examination of the drug-related witnesses followed, nearly verbatim, the direction and proof it used in the earlier trial. Thereafter, in its closing argument, the government repeatedly argued that the funds at issue in the money laundering transactions came from Petitioner's *own* prior drug dealing—the same offenses for which he had previously been acquitted.

The jury found Petitioner guilty on eight of the thirty-one counts of money laundering (totaling $730,000 in payments to lawyers), one count of conspiracy to launder drug proceeds, one count of conspiracy to obstruct justice, one count of obstruction of justice by bribing a witness, and one count of obstruction of justice by bribing a juror. App. 17a-18a. In addition, the jury returned a special

forfeiture verdict under a preponderance of the evidence standard, finding that the amount involved in the money laundering conspiracy was $15 million. App. 18a. The jury acquitted Petitioner of the remaining counts, including a charge of witness tampering by way of violence. *See* Judgment, No. 99-583 (S.D. Fla. Jan. 23, 2003).

The district court sentenced Petitioner to 205 years in prison, which broke down as follows: twenty years imprisonment on each of the nine separate money laundering counts, which included conspiracy as one of the counts; five years imprisonment for conspiracy to obstruct justice; ten years for obstruction of justice by juror bribery; and ten years for obstruction of justice by bribing a witness. App. 18a.

Over Petitioner's Sixth Amendment objections, the court imposed the sentences consecutive to each other, relying on two alternative grounds. First, despite Petitioner's assertion that "'[t]he notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [our constitutional] jurisprudence,'" Sentencing Hearing 1/22/03 Tr. 795 (quoting *United States* v. *Watts*, 519 U.S. 148, 170 (1997) (Stevens, J., dissenting)), the court found that Petitioner had laundered $35 million in drug proceeds. In so doing, the court ignored the jury's verdict finding Petitioner guilty of money laundering counts totaling only $730,000, as well as its finding—under a preponderance of the evidence standard—that the overall laundering conspiracy involved $15 million. Second, the Court reasoned that the "egregious

nature" of the bribery offenses warranted an upward departure. App. 46a-47a.

5. On appeal, the Eleventh Circuit affirmed in part and reversed in part. The Eleventh Circuit reversed Petitioner's conviction for obstruction of justice through jury bribery because it rested on improperly admitted hearsay evidence. App. 37a-38a. It affirmed all of Petitioner's remaining convictions, including those for money laundering. App. 51a. The Eleventh Circuit acknowledged that the government had used evidence of criminal activity for which Petitioner had been acquitted "in order to establish in this case the 'specified unlawful activity' element of the money laundering charges." App. 20a. But the court rejected Petitioner's collateral estoppel argument, reasoning that, since the money laundering statute does not require that a defendant launder the proceeds of his *own* criminal activity—just that he knows that he is laundering the proceeds of *some* felony drug offenses—the government hypothetically could have secured a conviction under that statute without relying on previously-acquitted conduct by showing that Petitioner had laundered *someone else's* drug proceeds. App. 23a-24a.

The Eleventh Circuit also rejected Petitioner's sentencing arguments. It concluded that it "need not decide if the district court erred in calculating [Petitioner's] offense level using an amount greater than the $15 million figure that the jury found in the special forfeiture verdict" because the district court's alternative upward departure was valid. App. 45a. The district court based that upward departure in part on Petitioner's now-invalid conviction for

bribing a juror, but the Eleventh Circuit held that its reversal of that conviction "does not undermine the factual premise of the district court's preemptive departure decision." App. 47a n.8. "[I]t is well-established that, in sentencing, a district court can consider [evidence] even if it was not admissible in determining guilt, so long as there are sufficient indicia of reliability." *Ibid.* The court vacated Petitioner's sentence and remanded the case to the district court with directions either to reimpose his sentence "with a reduction of 120 months as a result of there being no conviction for [bribing a juror]," or to resentence on all counts. App. 51a.

6. Petitioner filed a petition for a writ of certiorari, which this Court denied (548 U.S. 903 (2006)) after the government argued that the interlocutory posture of the case was reason alone to deny the petition. Gov't Br. in Opp., *available at* 2006 WL 1463612, at *13. The government also asserted that the denial of certiorari would "not preclude petitioner from raising the same issues in a later petition, after the entry of final judgment." *Ibid.*

7. On remand to the district court, the government did not recharge Petitioner with obstruction of justice through juror bribery. The government instead recommended that the district court reduce Petitioner's sentence by 120 months instead of resentencing him across the board. The district court, after hearing argument from Petitioner regarding the unreasonableness of even a reduced sentence and the reliance on acquitted and unproven conduct to calculate that sentence, agreed with the government

and sentenced Petitioner to 195 years in prison. App. 5a.

8. Petitioner appealed to the Eleventh Circuit, arguing, *inter alia*, that the 195-year sentence was procedurally and substantively unreasonable and that the district court's reliance on conduct that the government tried and failed to prove to the jury to impose Petitioner's sentence violated the Fifth and Sixth Amendments. The Eleventh Circuit affirmed. App. 16a.

9. This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

1. The doctrine of collateral estoppel, which "stands for an extremely important principle in our adversary system of justice," *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), is grounded in the realities of a trial. Simply put, if a jury previously found that someone did not commit an unlawful act, the government may not relitigate that issue in a later trial. That the government hypothetically might be able to prove its new charges without contradicting the prior jury verdict is of no moment if the government offers no evidence to support such a hypothetical factual theory.

The Court of Appeals here rejected Petitioner's collateral estoppel argument on a factual theory that had *no* support in the record. In so doing, the Eleventh Circuit not only broke from this Court's well-established case law, but it also exposed a fissure in how the Courts of Appeals and highest

state courts apply criminal collateral estoppel. The majority of courts recognize that resolving collateral estoppel disputes requires an analysis grounded in the evidence and arguments actually in the record. A smaller group, however, allows a later prosecution to proceed simply on theoretical proof, irrespective of the underlying evidence. This Court should grant review of the Eleventh Circuit's judgment in order to rectify this troubling development.

2. The Eleventh Circuit also improperly condoned the use of unproven conduct with respect to Petitioner's sentence. Some courts and judges have recognized that this Court's robust conception of the Sixth Amendment in *United States v. Booker*, 543 U.S. 220 (2005), means that defendants' sentences may no longer be based on such conduct. But the Eleventh Circuit and other courts have adopted the opposite view, maintaining that this Court's per curiam decision in *United States v. Watts*, 519 U.S. 148 (1997), allows sentencing courts to continue considering acquitted conduct. This Court should resolve the confusion and hold that the Sixth Amendment and the Due Process Clause do not tolerate such end runs around the primacy of juries in criminal cases, even under the current federal "advisory guidelines" sentencing regime.

I. This Court Should Grant Review To Resolve Disagreement Over The Scope Of The Criminal Collateral Estoppel Doctrine.

A. The Eleventh Circuit's Decision Contravenes This Court's Precedent.

1. From its inception, this Court has grounded criminal collateral estoppel in the actual facts of the case before it.

Basic principles of constitutional and federal law proscribe subjecting criminal defendants to the repeated crucible of a trial to determine the fate of their liberty when a jury has already found them not guilty of certain conduct. "[T]he law attaches particular significance to an acquittal," so that "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent, he may be found guilty.'" *United States v. Scott*, 437 U.S. 82, 91 (1978) (quoting *Green v. United States*, 355 U.S. 184, 188 (1957)).

1. The rise of collateral estoppel in the criminal realm resulted from the changing nature of prosecutions themselves. With the "extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10. As a result, "the potential for unfair and abusive reprosecutions became far more pronounced," and "federal courts soon recognized the

need to prevent such abuses through the doctrine of collateral estoppel." *Ibid.*

In *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916), this Court rejected the argument that res judicata,[2] while an accepted part of civil litigation, did not apply to criminal defendants except in the modified form of Fifth Amendment Double Jeopardy. Speaking for the Court, Justice Holmes wrote that the Fifth Amendment "was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time." *Id.* at 88 (citation omitted). After *Oppenheimer*, this Court continued to apply res judicata and collateral estoppel to criminal proceedings, noting that the analysis "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. United States*, 332 U.S. 575, 579 (1948).

2. In *Ashe v. Swenson*, 397 U.S. 436, 443 (1970), this Court confirmed that the doctrine of collateral estoppel was grounded in the Double Jeopardy Clause of the Constitution and "has been an established rule of federal criminal law at least since" *Oppenheimer*. Unlike classic double jeopardy doctrine, collateral estoppel "operates to conclude those matters in issue which the verdict determined[,] though the offenses be different."

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[2] "While the concepts of res judicata and collateral estoppel are distinct, within the context of double jeopardy they have been used by the Supreme Court interchangeably." 4 JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 29:41 (3d ed. 1996).

Sealfon, 332 U.S. at 578. Collateral estoppel simply "means . . . that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe*, 397 U.S. at 443.

Ashe established a two-step process for assessing collateral estoppel challenges on appeal. First, one must ascertain the basis for defendant's acquittal at the initial trial. *Id.* at 444. Then, a court must determine whether, in the second trial, the government can prove the elements of its case without relying on the conduct for which the first jury acquitted defendant. *See ibid.* Unless "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," the government's second prosecution is estopped. *Ibid.* (quotations omitted).

2. Contrary to this Court's teachings, the Eleventh Circuit failed to apply collateral estoppel based on the case's actual record.

The Eleventh Circuit's decision squarely contradicts this Court's teachings in *Ashe*, its progeny, and its common law predecessors[3] that courts must eschew theoretical application of collateral estoppel doctrine. By ignoring the actual

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[3] Because Petitioner is not asking this Court to review the judgment of a state court, there is no need in this case to delineate exactly whether common law collateral estoppel principles are broader than those grounded in the Double Jeopardy Clause.

record of the case before it, the Eleventh Circuit ignored *Ashe*'s instruction to apply collateral estoppel "with realism and rationality," and not in a "hypertechnical" way. *Ashe*, 397 U.S. at 444. Its "technically restrictive" view of collateral estoppel "would . . . amount to a rejection of the rule of collateral estoppel in criminal proceedings," and cannot stand. *Ibid.*

The record of this case starkly reveals that the government relied upon the drug offenses for which Petitioner had been acquitted to prove beyond a reasonable doubt that the financial transactions in its money laundering charges involved "the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i). The Eleventh Circuit assumed that the first jury determined that Petitioner did not import or distribute narcotics, but, to avoid the collateral estoppel effect of the earlier jury's acquittal, it speculated that Petitioner *could have* laundered the proceeds of someone else's unlawful activity. App. 23a-24a.

Ashe does not allow this result. *Ashe* and its progeny specifically reject hypertechnical applications of collateral estoppel doctrine that would render this "extremely important principle," 397 U.S. at 443, completely illusory. *See also Turner v. Arkansas*, 407 U.S. 366, 369 (1972) (per curiam) (where defendant had been acquitted of murder in course of robbery, he could not then be tried for robbery); *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam) (where defendant had been acquitted of murdering bomb victim, he could not then be tried for murder and assault of other victims

of same blast); *Simpson v. Florida*, 403 U.S. 384, 386-87 (1971) (per curiam) (where defendant had been acquitted of armed robbery of store manager, he could not then be tried for armed robbery of store customer)

"If the prosecution wants to continue to pursue a defendant who has won an acquittal, collateral estoppel requires that the prosecution find a *new basis* on which to proceed. The prosecution should not be able to avoid that prohibition by fitting the rejected theory and evidence to new charges." Anne Bowen Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. CIN. L. REV. 1, 21 (1989) (emphasis added); *see also United States v. Dixon*, 509 U.S. 688, 705 (1993) ("The collateral-estoppel effect attributed to the Double Jeopardy Clause may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts.") (citation omitted) (emphasis removed). Yet that is exactly what the government did here; even a cursory review of the records of the two proceedings gives one a sense of "déjà vu all over again."[4]

While it is true that the government here did not need to prove that Petitioner himself committed specified unlawful acts to generate the money that was laundered, it did have to prove—beyond a reasonable doubt—that the proceeds came from someone's unlawful activity. But the *only* evidence the government presented in this respect involved alleged acts by Petitioner, the very acts the prior jury

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[4] Yogi Berra, *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 754 (16th ed. 1992).

found he did not commit. The fundamental teaching of *Ashe*, however, is that when one jury determines "that the defendant was not one of the criminals involved in the alleged crime, a second prosecution for crimes arising out of the same event is wholly impermissible." ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CRIMINAL § 12:26 (4th ed. 2003). *See also Lewis v. United States*, 518 U.S. 322, 336 (1996) ("government may be barred by collateral estoppel if a fact is found in favor of the defendant and is dispostive in later trials") (Kennedy, J., concurring).[5]

Applying the Eleventh Circuit's view of collateral estoppel to prior decisions of this Court demonstrates

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[5] *Dowling v. United States*, 493 U.S. 342 (1990), is not to the contrary. There, this Court held that a prior acquittal does not preclude the government from relitigating a question of fact if that issue is governed by a lower standard of proof in a subsequent proceeding. *Id.* at 347-50. *Dowling* does not control the situation where, as here and in *Ashe*, "the prior acquittal determined facts [that] were a necessary element for the second offense." *Dowling*, 493 U.S. at 357 n.1 (Brennan, J., dissenting). *See also United States v. Bailin*, 977 F.2d 270, 280 (7th Cir. 1992) ("*Dowling* thus establishes that issue preclusion in criminal cases only applies when the relevant issue is 'ultimate' in the subsequent prosecution, i.e., when the issue must be proven beyond a reasonable doubt."); *United States v. Seley*, 957 F.2d 717, 723 (9th Cir. 1992) ("*Dowling* did not alter *Ashe* so much as it introduced a new perspective on the meaning of 'ultimate fact' decided in the first trial."); *United States v. Mespoulede*, 597 F.2d 329, 334 (2d Cir. 1979) (describing the "*Ashe v. Swenson* paradigm [as when] the fact sought to be relitigated is essential to conviction and thus must be proved beyond a reasonable doubt"). Here, the acquitted conduct was the sole evidence the government introduced to prove an essential element of the money laundering charge—the specified unlawful activity—that the government had to prove beyond a reasonable doubt.

how extreme that view is. For example, in *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam), the Court held that collateral estoppel precluded defendant's indictment for robbery because an earlier jury had acquitted him of murder in the course of committing a robbery. The state stipulated that the evidence it "would present on the robbery charge would be identical with that it introduced on the murder charge." *Id.* at 368. Examining the record of the first trial, the Court held that the jury's verdict "necessarily mean[t] that it found petitioner not guilty of . . . killing" in the course of robbery. *Id.* at 369. This Court explicitly rejected as irreconcilable with the record of the first trial the state's attempt to characterize the jury's verdict as not necessarily deciding whether defendant robbed the victim. *Ibid.*

Viewing the facts of *Turner* through the Eleventh Circuit's collateral estoppel lens would have yielded a much different result. Even if the Court of Appeals assumed that the first jury in the murder trial necessarily decided that the defendant had not robbed his victim, it would have still allowed the government to proceed on the robbery charge based on the hypothetical possibility that the government could have obtained a valid robbery conviction by proving that the defendant had robbed someone other than the murder victim that night. Never mind that there was no evidence in the record to support such a theory; the Eleventh Circuit's rule deals solely in possibilities, not realities.

B. The Eleventh Circuit's Decision Conflicts With The Rule In Other Federal Courts Of Appeals And State Courts.

The Eleventh Circuit's hypertechnical application of collateral estoppel—which unmoored the doctrine from the actual facts of the case at issue—intensifies a conflict in the federal Courts of Appeals and state courts of last resort. Following *Ashe*, lower courts have consistently recognized that, at the first step of the analysis, they must look to the actual facts and trial theory in the prior trial to determine the basis for the jury's acquittal.[6] But when it comes to the second step of assessing whether the government, *in a subsequent trial*, may present factual theories inconsistent with that prior acquittal, courts diverge. One group of courts recognizes that collateral estoppel requires them to look to the government's

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[6] *E.g.*, *United States v. Carbullido*, 307 F.3d 957, 963 (9th Cir. 2002) (*Ashe* "precludes limiting the determination of a jury to the minimum necessary to return a verdict of not guilty under the precise terms of an indictment; consideration of the evidence is necessary") (quotations omitted); *United States v. Leach*, 632 F.2d 1337, 1340 (5th Cir. 1980) (rejecting government's theory as to how first jury decided issue in case because while it was "of course, plausible in theory, . . . the most obvious difficulty with this is that the government did not try its case on that theory") (quotation marks and alteration removed); *United States v. Day*, 591 F.2d 861, 869 n.19 (D.C. Cir. 1978) ("Conceivably, there may have been some circumstance in the first trial that led that jury to conclude that all of the requirements for guilt had not been demonstrated beyond a reasonable doubt. . . . Yet we are convinced on the record presented here that the requirements for invocation of the collateral estoppel doctrine are met."). In other words, there is a symmetry to the application of collateral estoppel in that the actual record of both the first *and* the second proceeding governs the collateral estoppel analysis.

actual allegations in the new case and will not allow the government to avoid collateral estoppel based merely on hypothetical theories they are not advancing. However, the Eleventh Circuit and the Supreme Court of Wyoming have strayed from *Ashe* and allow the government to proceed based on wholly hypothetical theories, irrespective of its actual evidence and allegations.

1. Thirteen courts—including five federal Courts of Appeals and five state high courts—hold that the government may not use alleged conduct to prove a crime if a jury in a prior trial found that the defendant did not engage in it. The facts of *United States v. Mock*, 604 F.2d 341 (5th Cir. 1979), for example, are on all fours with this case, but there the Fifth Circuit reached the opposite result. Mock had been acquitted on charges of conspiracy to import, possess, and distribute marijuana. *Id.* at 342. Later, the government charged Mock with tax evasion and "urged . . . that [Mock] received income from the very conspiracy operation of which he had been acquitted in the first trial. In addition, the government elicited essentially identical testimony from [the same witness] to prove that [Mock] received income from the marijuana conspiracy." *Id.* at 344.

The Fifth Circuit rejected the government's attempt to avoid the collateral estoppel effect of the first acquittal by introducing in the subsequent proceeding a theory unsupported by the actual facts of the case:

> *Theoretically*, it is true that appellant *might* be found not guilty of the conspiracy charge and yet have committed the substantive

> crimes of importation and distribution of marijuana; and therefore it might also be *theoretically* true that even though the first trial established as a fact that appellant was not a member of the . . . conspiracy, *appellant might nevertheless have derived taxable income from the distribution or sale of marijuana in 1972 (from sources other than the [alleged conspiracy]).* . . . If the government *had* presented evidence that appellant had derived income from the sale of marijuana on facts *other than* those showing that he derived income *from this particular conspiracy*, then such evidence would be neither inconsistent with the prior verdict of acquittal nor barred by collateral estoppel. However, the *facts of this case* do not conform to these hypotheticals: The government based its case upon the very theory that appellant derived income from the conspiracy of which he already had been acquitted.

Id. at 344-45 (emphasis added). The court found it irrelevant that the "appellant's acquittal on the conspiracy charge d[id] not negate the *possibility* that he may otherwise have derived income from the sale or distribution of marijuana." *Id.* at 345 (emphasis added). As far as the Fifth Circuit was concerned, "[f]or purposes of any subsequent prosecution of [Mock], [his] acquittal has conclusively established that [he] did not participate in a

marijuana conspiracy . . . during the time frame of the first indictment." *Ibid.*[7]

The Ninth Circuit is in accord. In *United States v. Stoddard*, 111 F.3d 1450 (9th Cir. 1997), the court held that defendant's acquittal of conspiracy to distribute marijuana—where the jury necessarily decided that the $74,000 used to purchase drugs did not belong to defendant—barred the government's later indictment of defendant for submitting false income tax returns *if* that charge depended on the defendant's ownership of the $74,000 allegedly not reported to the IRS. *Id.* at 1458-59. The court, however, allowed that *if* the false income tax return charge could "be supported by evidence *other than* [defendant's] alleged ownership of the $74,000,

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[7] In *Green v. Estelle*, 601 F.2d 877 (5th Cir. 1979), the Fifth Circuit also refused to allow the government to avoid collateral estoppel based on a hypothetical argument not advanced in the second trial. There, the state charged the defendant in two separate indictments of murdering two people with malice. *Id.* at 877. On trial for the murder of one of the victims, the jury found defendant guilty of murder *without* malice. *Ibid.* Subsequently, the state went forward on the murder with malice charge for the second victim. *Ibid.* The defendant argued, and the Court of Appeals agreed, that because the jury in the first murder trial "must have determined the malice issue in [defendant's] favor," *id.* at 878, collateral estoppel precluded relitigating the issue of his malice in the second trial, *id.* at 879. The Fifth Circuit rejected the state's attempt to avoid collateral estoppel by raising a hypothetical not supported by evidence in the record—namely, the state argued that, because the defendant's state of mind "might have changed between the two killings," it was not religitating the issue of malice in the murder of the second victim. *Ibid.* The Fifth Circuit rejected this hypothetical because "[t]here [wa]s absolutely no evidence indicating a change in [defendant's] intent." *Ibid.*

collateral estoppel would not bar" his prosecution on that count. *Id.* at 1459-60 (emphasis added).[8] Thus, like the Fifth Circuit, the Ninth Circuit also requires that the government's theory of the case find support in the *actual* record before it declines to apply collateral estoppel.[9]

Other federal courts have adopted the same rule. *See United States v. Calderone*, 982 F.2d 42, 48 (2d Cir. 1992) (where defendant had been acquitted of conspiracy to commit various drug crimes, collateral estoppel precluded government from relying on conspiracy as evidence of a drug offense in later charge of using telephone to facilitate narcotics offenses; prosecution could proceed if government had evidence of *other* drug offenses); *Pugliese v. Perrin*, 731 F.2d 85, 89-90 (1st Cir. 1984) (rejecting government's attempt to "plug[]" an "evidentiary gap" in its negligent homicide prosecution with conduct forming the basis of defendant's previous acquittal for manslaughter; prosecution could proceed only on *other* evidence of negligence); *Feela*

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[8] *Accord United States v. James*, 109 F.3d 597, 601 (9th Cir. 1997) (where defendant was acquitted of three counts of bank robbery, collateral estoppel would not bar charge of conspiracy to commit bank robbery "*if* [the government] were to proffer proof of overt acts contained in the indictment that are *independent of the three acquitted bank robbery counts*") (emphasis added).

[9] For a recent case in the Ninth Circuit applying this rule, see *Melonzi v. Hubbard*, 2008 WL 3539479, at *4-*6 (N.D. Cal. 2008) (in trial for continuous sexual abuse, government could not introduce evidence of rape for which defendant had been acquitted as one of the three acts necessary to show continual abuse; prosecution could proceed only on *other* evidence of abuse).

v. Israel, 727 F.2d 151, 155 (7th Cir. 1984) (acquittal of car theft should have collaterally estopped state from introducing evidence of theft as one of defendant's possible acts to effect the object of a conspiracy at later trial for conspiracy to commit armed robbery; conviction relying on that ground would be unconstitutional despite existence of other possible overt acts); *see also United States v. Crispino*, 586 F. Supp. 1525, 1534 (D.N.J. 1984) (in trial for tax evasion, government could not introduce evidence of drug trafficking enterprise for which defendant had been acquitted as source of income).

Five state high courts likewise apply *Ashe* with realism and an eye to the facts actually at issue in the second proceeding. In *State v. Henning*, 681 N.W.2d 871 (Wis. 2004), the Wisconsin Supreme Court held that collateral estoppel precluded the state from prosecuting defendant for bail jumping based on a theory that he violated the conditions of his bond—a necessary element of bail jumping—by possessing controlled substances with intent to deliver because he had already been acquitted of those charges. *Id.* at 879. While the state could proceed based on some *other* alleged violation of his bond conditions, using the theory that he possessed drugs with intent to deliver would constitute an impermissible retrial on that issue. *Id.* at 886.

Other state courts of last resort have invoked similar reasoning. *See State v. Aparo*, 614 A.2d 401, 414 (Conn. 1992) (acquittal on accessory to murder charge in which "jury necessarily rejected some evidence that, if believed, could establish essential elements of conspiracy," collaterally estopped retrial

on conspiracy to commit murder); *State v. Miller*, 471 So. 2d 603, 607-08 (La. 1990) (acquittal of attempted aggravated rape collaterally estopped prosecution for kidnapping arising from same crime where "the record [of second trial] strongly suggests that the state was relying on the existence of an attempted aggravated rape as the sole basis for satisfying the 'unlawful purpose' element" of the kidnapping charge); *Simon v. Commonwealth*, 258 S.E.2d 567, 572 (Va. 1979) (acquittal on driving under influence of intoxicants collaterally estopped government in later involuntary manslaughter prosecution from arguing defendant was intoxicated; state could proceed only with "other acts of criminal negligence"); *Commonwealth v. Grazier*, 393 A.2d 335, 337 (Pa. 1978) (acquittal of mail fraud in connection with alleged arson scheme collaterally estopped later prosecution for arson where first jury had necessarily determined that defendant did not commit arson and the *only* evidence the prosecutor had to establish "that fact" was "substantially the same as that presented at the [first] trial"); *see also State v. Wade*, 2008 WL 366143, at *5-*7 (Ohio Ct. App. 2008), *on reconsideration*, 2008 WL 1723671, *rev. denied*, 891 N.E.2d 769 (Ohio 2008), *petition for cert. filed*, 77 U.S.L.W. 3281 (U.S. Oct. 30, 2008) (No. 08-585) (reversing conviction because court failed to give limiting instruction precluding jury from relying on previously acquitted conduct in order to find element of new charges satisfied).[10]

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[10] Ohio has filed a petition for certiorari in *Wade*, arguing that collateral estoppel does not bar the admission of evidence, even when that evidence is conduct for which the defendant has been acquitted and proves an element of charge in the second trial.

2. By permitting the government to prove a crime using allegations a jury previously rejected, so long as it *hypothetically* could prove the charge with different evidence, App. 23a-24a, the Eleventh Circuit stands in direct conflict with these authorities.

So does the Wyoming Supreme Court. In *Eatherton v. State*, 810 P.2d 93, 100 (Wyo. 1991), the court held that the defendant's prior acquittal on a larceny charge did not prevent the government from relying on that alleged conduct to prove an element in defendant's later trial for burglary. To prove burglary, the government had to show that the defendant made an "unlawful entry . . . with an intent to commit larceny *or* a felony in the premises." *Id.* at 99 (emphasis added). As the dissent pointed out, however, "[w]ithout proof that [defendant] stole [the victim's] wallet and money"—conduct for which he had already been acquitted in the larceny trial—"there was no proof of an 'intent to commit larceny'" necessary to sustain the burglary conviction. *Id.* at 104 (Urbigkit, C.J., dissenting). Nor was there any suggestion in the majority or dissenting opinion that the state presented evidence that defendant actually had an intent to commit any other felony when he entered the premises. "In other words, the ultimate fact in the first proceeding *was* determinative in the second proceeding" and should have been barred by collateral estoppel. *Ibid.* (emphasis added).

Ohio Cert Pet., *available at* 2008 WL 4792488, at *13-*18. If this Court grants review in that case, it should hold this Petition and dispose of it in accordance with the ultimate result in *Wade*.

There is no way to reconcile these two groups of decisions. This Court is the only institution that can bring order to this important area of criminal procedure. It should do so before more defendants have to face successive prosecutions for alleged actions that juries already have determined the government could not prove.

II. This Court Should Grant Review To Address The Permissibility Of Sentencing Someone Based On Alleged Conduct For Which The Government Tried And Failed To Obtain A Valid Jury Verdict.

Review also is warranted here because this case vividly highlights the need for this Court to decide whether sentencing a defendant based on acquitted conduct violates (1) the Fifth and Sixth Amendments in general; (2) the Fifth and Sixth Amendments at least when the sentence would be substantively unreasonable but for the truth of the acquitted conduct; or (3) the requirement in *United States v. Booker*, 543 U.S. 220 (2005), that sentences be "reasonable."

1. Ever since this Court held in *Booker* that the federal sentencing guidelines needed to be "advisory" in order to comport with the Sixth Amendment, *id.* at 233, one remaining constitutional issue has stood out: May federal courts continue to base increases of defendants' sentences on acquitted conduct? Although such sentencing is—as one federal appeals judge has remarked—"reminiscent of *Alice in Wonderland*, . . . [a]cquittal first, sentence afterwards," *United States v. Frias*, 39 F.3d 391, 393 (2d Cir. 1994) (Oakes, J., concurring) (quotations

omitted), this Court condoned it in *United States v. Watts*, 519 U.S 148 (1997) (per curiam). Yet *Booker* characterized *Watts* as a "very narrow" case dealing only with double jeopardy considerations, not the Sixth Amendment or Due Process Clause. 543 U.S. at 240 & n.4.

It is not surprising, therefore, that in the wake of *Booker*, lower courts have divided and expressed great consternation over whether the practice condoned in *Watts* is still legitimate. At least three district courts have held that *Watts* does not survive *Booker*'s construction of the Sixth Amendment. *United States v. Coleman*, 370 F. Supp. 2d 661, 669-73 (S.D. Ohio 2005); *United States v. Pimental*, 367 F. Supp. 2d 143, 150-53 (D. Mass. 2005); *United States v. Carvajal*, 2005 WL 476125, at *4 (S.D.N.Y. 2005). The District of Massachusetts explained that:

> *Booker* substantially undermines the continued vitality of *United States v. Watts* both by its logic and by its words. It makes absolutely no sense to conclude that the Sixth Amendment is violated whenever facts essential to sentencing have been determined by a judge rather than a jury, *Blakely v. Washington*, [542 U.S. 296, 305] (2004), and also conclude that the fruits of the jury's efforts can be ignored with impunity by the judge in sentencing.
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> . . . Sentencing today—even post-*Booker*—is still profoundly influenced by the rules, namely the Guidelines. That is what the remedy opinion admonishes; that is what the post-*Booker* case law suggests. It is, in

> effect, a hybrid regime—neither purely discretionary nor mandatory Guidelines. And that fact has certain consequences in terms of the significance of acquitted conduct, and more generally, the procedural protections at sentencing.
>
> To consider acquitted conduct trivializes "legal guilt" or "legal innocence"—which is what a jury decides—in a way that is inconsistent with the tenor of the recent case law. . . . [W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved.

Pimental, 367 F. Supp. 2d at 150-52 (footnote omitted; emphasis removed). Furthermore, even if *Booker* does not totally preclude sentencing courts from considering alleged conduct the jury refused to find, such conduct must at least be proved—contrary to the alleged conduct here—beyond a reasonable doubt. *Id.* at 153-54; *accord United States v. Baldwin*, 389 F. Supp. 2d 1, 2 (D.D.C. 2005).

A number of judges on the federal Courts of Appeals have similarly recognized that using unproven conduct to increase a defendant's sentence violates the Sixth Amendment:

> When a jury refused to convict defendants of several counts, but the trial court nonetheless relies on that same acquitted conduct to increase the defendants' sentences . . ., the jury has not authorized

> the resulting sentence in any meaningful sense. Reliance on acquitted conduct in sentencing dramatically undermines the protections enshrined in the Sixth Amendment.

United States v. Mercado, 474 F.3d 654, 658 (9th Cir. 2007) (B. Fletcher, J., dissenting); *accord United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring) ("clear implication" of *Apprendi*, *Blakely*, and *Booker* is that a "judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence"); *United States v. Thompson*, 515 F.3d 556, 570 (6th Cir. 2008) (Merritt, J., dissenting) ("ratcheting-up" sentences "based upon judicial findings of fact . . . is completely inconsistent with the *Blakely* and *Booker* opinions"); *United States v. Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (en banc) (Ambro, J., concurring in judgment) (allowing "sentencing judges, once a jury has found . . . that a defendant has committed *one* crime, then to find him guilty by a preponderance of evidence of *other* crimes for which he was *not* tried – or worse, tried and acquitted – and to sentence him as if he had been convicted of *them* as well" amounts to "a shadow criminal code under which . . . a defendant receives few of the trial protections mandated by the Constitution") (emphasis in original); *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., concurring) ("the most pernicious effect of sentencing on the basis of acquitted conduct . . . is its implicit and often hopeless demand that, in order

to avoid punishment for charged conduct, criminal defendants must prove their innocence under two drastically different standards at once").

Members of this Court have also recognized that the use of acquitted conduct in sentencing defendants raises constitutional issues. *Watts*, 519 U.S. at 169-70 (Stevens, J., dissenting) ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so proved is repugnant to [our constitutional] jurisprudence."); *id.* at 170 (Kennedy, J., dissenting) ("to increase a sentence based on conduct underlying a charge for which the defendant was acquitted does raise concerns about undercutting the verdict of acquittal").[11]

This case exemplifies why such an approach violates the rights to jury trial and due process. Here, the *high* end of Petitioner's sentencing range authorized by *facts found by the jury* beyond a reasonable doubt was 235 months, or under 20

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[11] Numerous commentators agree that this Court's Sixth Amendment jurisprudence precludes judges from relying on acquitted conduct when sentencing a defendant. *E.g.*, Steven G. Kalar & Jon M. Sands, *An Object All Sublime—Let the Punishment Fit the Crime*, 32 CHAMPION 20, 28-29 (March 2008); James J. Bilsborrow, Note, *Sentencing Acquitted Conduct to the Post-*Booker *Dustbin*, 49 WM. & MARY L. REV. 289, 292 (2007); Joseph E. Kennedy, *Cautious Liberalism*, 94 GEO. L. J. 1537, 1557 (2006); Richard E. Myers II, *Restoring the Peers in the "Bulwark":* Blakely v. Washington *and the Court's Jury Project*, 83 N.C. L. REV. 1383, 1406-10 (2005).

years.[12] The district court, however, imposed a 195-year sentence based on alleged conduct, all of which the government failed–to prove to the jury.[13] Thus, Petitioner's 195-year sentence is almost *ten times* the sentence he would have received if the district court had not relied on unproven conduct. In other words, the jury's verdicts of acquittal did not matter; instead, the district court substituted its judgment that "justice require[d] that [Petitioner] be given the sentence [he] would have been given if [he] had been found guilty" in the 1996 trial for drug trafficking. Status Conf. 10/6/06 Tr. 37-38; *see also* Sentencing Hearing 11/29/06 Tr. 17, 60-61.

The Eleventh Circuit allowed Petitioner's sentence to stand, App. 1a n.1, 46a-48a, consistent with its prior holding that "nothing in *Booker* erodes" its past precedent allowing "[r]elevant conduct of which a defendant was acquitted [to] be taken into account in sentencing for the offense of conviction." *United*

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[12] The offense level based on facts found by the jury would have been no more than 32. The resulting Guidelines range for that level is 188-235 months.

[13] The district court relied on the following unproven facts to sentence Petitioner: (i) the alleged drug offenses for which a jury acquitted Petitioner in 1996; (ii) Petitioner laundered over $35 million, even though the jury found beyond a reasonable doubt that he was guilty of substantive money laundering crimes involving only $730,000, and that, even using the same preponderance of the evidence standard the judge used, the entire laundering conspiracy involved only $15 million; and (iii) the allegation that Petitioner bribed a juror in his previous trial, even though the Eleventh Circuit held that the government used inadmissible evidence to secure that conviction and thus reversed it. App. 46a-47a; Status Conf. 10/6/06 Tr. 37-38; Sentencing Hearing 11/29/06 Tr. 17, 60-61.

States v. Duncan, 400 F.3d 1297, 1304-05 (11th Cir. 2005) (quotations omitted). The Eleventh Circuit's decision is consistent with other Courts of Appeals that have issued similar rulings, reasoning generally that courts may continue to consider acquitted conduct because *Booker* did not overrule *Watts* and/or that "consideration of acquitted conduct violates the Sixth Amendment only if the judge imposes a sentence that exceeds what the jury verdict authorizes." *United States v. Dorcely*, 454 F.3d 366, 371-73 (D.C. Cir. 2006). *Accord United States v. Mercado*, 474 F.3d 654, 656-57 (9th Cir. 2007); *United States v. Brika*, 487 F.3d 450, 459 (6th Cir. 2007); *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006); *United States v. Gobbi*, 471 F.3d 302, 313-14 (1st Cir. 2006); *United States v. High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States v. Price*, 418 F.3d 771, 787-88 (7th Cir. 2005); *United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005); *United States v. Magallenez*, 408 F.3d 672, 683-85 (10th Cir. 2005).

The time has come for this Court to resolve this question. Until it does, the integrity and public perception of the criminal justice system will continue to suffer, as the lower courts avoid the issue by relying on *Watts*, apparently afraid to go where this Court has not yet explicitly gone. This Court should bring an end to this unseemliness and uncertainty and hold that sentencing a defendant to the same sentence he would have received had he been convicted of the counts on which the jury acquitted eviscerates the Sixth Amendment right to a jury and the Due Process Clause.

2. Even if basing a defendant's sentence on acquitted conduct does not always violate the Constitution, doing so must violate the Sixth Amendment when that conduct is necessary for the sentence to be substantively reasonable. This Court "has not foreclosed as-applied constitutional challenges to sentences. The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory Guidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall v. United States*, 128 S. Ct. 586, 602-03 (2007) (Scalia, J., concurring); *see also Rita v. United States*, 127 S. Ct. 2456, 2478 (2007) (Scalia, J., concurring in part and concurring in judgment) ("there will inevitably be *some* constitutional violations . . . because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts") (emphasis in original); *Marlowe v. United States*, 2008 WL 4550707, at *1 (U.S. Oct. 14, 2008) (Scalia, J., dissenting from denial of certiorari) (appellate court's holding that a life sentence was constitutional "solely because of [a] judge-found fact," "falls short of what we have held the right to trial by jury demands").

Here, the Court of Appeals upheld Petitioner's 195-year sentence as reasonable because "his crimes were serious and involved a wholesale corruption of our system of justice" and "his criminal activity began in the 1970s," thus ignoring the jury's acquittal in 1996 of such allegations. App. 11a; *see also* App. 46a. As explained above, however, the high end of Petitioner's sentencing range authorized by facts

found by the jury was just under 20 years. Absent additional judge-found facts, Petitioner's 195-year sentence—approximately ten times the high end of the range authorized by the jury's verdict—would be patently unreasonable. The Eleventh Circuit's reliance on judge-found facts to uphold the sentence should not stand.

3. Finally, Petitioner's sentence violates the remedial portion of *Booker* that requires sentences to be reasonable "with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261. That statute instructs the district court to consider "the nature and circumstances *of the offense*," 18 U.S.C. § 3553(a)(1) (emphasis added), the need for the sentence "to reflect the seriousness *of the offense*, to promote respect for the law, and to provide just punishment *for the offense*," *id.* § 3553(a)(2)(A) (emphasis added), and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been *found guilty of similar conduct*," *id.* § 3553(a)(6) (emphasis added). The "offense" is the offense *of conviction.* Under the statute, therefore, it is unreasonable for to a court to base its sentence excessively on acquitted or otherwise unproven conduct.

This Court should grant review to hold that reliance on unproven conduct to impose a 195-year sentence renders the sentence substantively unreasonable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 3, 2008

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Salvador MAGLUTA, a.k.a. Sal,
Defendant-Appellant.
No. 06-16473
Non-Argument Calendar.

June 5, 2008.

Bruce Rogow, Bruce S. Rogow, P.A., Fort Lauderdale, FL, for Defendant-Appellant.

Madeleine R. Shirley, Anne R. Schultz, U.S. Attorney's Office, Carol E. Herman, Miami, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 99-00583-CR-PAS.

Before ANDERSON, CARNES and HULL, Circuit Judges.

PER CURIAM:

For a second time, Salvador Magluta appeals his 195-year prison sentence imposed after he was convicted of conspiring to commit offenses against the United States in violation of 18 U.S.C. § 371, conspiring to commit money laundering in violation of 18 U.S.C. § 1956(h), obstructing justice by bribing a witness in violation of 18 U.S.C. § 1503, and money

laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). In a prior published opinion we affirmed his conviction for those crimes, but reversed his conviction on another obstruction of justice charge. *United States v. Magluta (Magluta I),* 418 F.3d 1166, 1186 (11th Cir. 2005). Because we reversed his conviction on that one charge, we also vacated the 205-year sentence the district court initially imposed. *Id.*

In this appeal, Magluta contends that the district court: (1) incorrectly calculated the applicable sentencing guidelines range; (2) imposed a procedurally and substantively unreasonable sentence; and (3) violated his Fifth Amendment privilege against self-incrimination by stating at a status conference before the re-sentence hearing that it would only reconsider the length of his sentence if he confessed to the obstruction of justice count that we reversed in his first appeal.[1]

I.

The facts and procedural history of this case are set forth in detail in our earlier opinion. *See Magluta*

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[1] Magluta also contends that the district court violated his Sixth Amendment right to trial by jury and Fifth Amendment right to due process of law by enhancing his sentence based on acquitted, pending, and uncharged offense findings made by a preponderance of the evidence. This argument is foreclosed by the law of this circuit. *See United States v. Rodriguez,* 398 F.3d 1291, 1299 (11th Cir. 2005) (holding that the use of extra-verdict enhancements, under an advisory guidelines regime, is not unconstitutional).

I, 418 F.3d at 1172-73. Because we reversed one of Magluta's convictions, we also vacated his sentence and remanded the case to the district court. We instructed the court as follows:

> If the government elects to dismiss count 8 [which was the conviction we reversed] instead of retry Magluta on that charge, or if a retrial on that count occurs and he is acquitted, the district court shall, at its discretion, either reimpose Magluta's sentence but with a reduction of [ten years] as a result of there being no conviction for count 8, or the court may resentence Magluta on all the other counts for which he remains convicted. If the government elects to retry Magluta on count 8 and he is re-convicted of that charge, the district court shall then re-sentence him on all the counts.

Id. at 1186.

After our mandate issued, Magluta filed motions in the district court asking for a *de novo* resentencing and for the opportunity to be present for any resentence proceeding. The district court held a status conference to address those motions. At the status conference the court heard argument from the government and Magluta on the motions. The court noted that it was inclined not to conduct a *de novo* resentencing and stated that:

> We had a four-day sentencing hearing. [Magluta] had an ample opportunity to present all matters in aid of mitigation,

> [Magluta] allocuted. I had all that I needed. I don't see any change that would create a manifest injustice. If anything, my reasons for departing, I feel even more comfortable given the further developments in the evidence that has come out.

In response to Magluta's counsel's arguments that Magluta was a changed man who was suffering from his incarceration in a harsh prison environment, the district court explained its reluctance to revisit its sentencing decision. The court said:

> [T]he only thing I would ever look for is if the man was able to stand up and tell me – ask the government to take the dismissal [of the count the Eleventh Circuit reversed] back, that I am finally going to be honest with myself and with the rest of the world and admit my guilt.

The court emphasized that it was "not hearing anything that . . . would be a major change that would require me to undertake a *de novo* sentencing." That court was later more direct, saying: "I wanted to cut to the quick. That's the only thing that I'm interested in, is if he is telling you, 'I am ready to say to the government convict me of Count 8.'" After the status conference, the district court granted Magluta's motion to be present at the resentence proceeding, but did not rule on his motion for a *de novo* resentencing. The day before the resentence hearing, Magluta filed a motion asking the district judge presiding over his case to recuse herself. In that motion he argued

that the court's statements at the status conference amounted to court participation in plea negotiations in violation of Federal Rule of Criminal Procedure 11, and showed pervasive bias against him. The court rejected both arguments and denied his motion.

The district court then held a resentence hearing, at which Magluta was present. The court heard argument from Magluta's counsel and from the government, but ultimately decided to impose a 195-year sentence. Magluta was also afforded the opportunity to address the court, which he did. The court did not hear any new evidence and expressly adopted its factfindings and guidelines calculations from the first sentence proceeding. The court did, however, consider the reasonableness of the sentence it imposed in relation to the factors set forth in 18 U.S.C. § 3553(a). After the hearing, the district court entered an "Amended Judgment" imposing a 195-year prison sentence. The amended judgment listed the reason for amending the original judgment as "Correction of Sentence on Remand." This is Magluta's appeal from that amended judgment.

II.

Magluta first contends that the district court incorrectly calculated the applicable guidelines range. Specifically, he argues that the district court miscalculated the value of the funds involved in his money laundering offenses, mistakenly applied a three-level enhancement after finding that Magluta committed

the offenses he was convicted of in this case while he was on release in another case, and incorrectly assigned him 11 criminal history points.

In his first appeal, Magluta raised both the funds calculation and criminal history arguments. *See Magluta I,* 418 F.3d at 1183-85. We did not address those issues head on but instead held that any error regarding them was harmless in light of the district court's statement at the first sentence proceeding that it would depart upward to reach the same sentence even if its guidelines calculations were erroneous. *Id.* at 1184.

Because we have already resolved those two issues and held in the prior appeal that the sentence was not due to be vacated based on them, we decline to revisit them now. *See generally Schiavo ex rel. Schindler v. Schiavo,* 403 F.3d 1289, 1291 (11th Cir. 2005) ("Under the law-of-the-case doctrine, [the resolution of] an issue decided at one stage of a case is binding at later stages of the same case. The doctrine operates to preclude courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal. . . . Law of the case binds not only the trial court but this court as well." (internal quotation marks and citations omitted; alteration in original)). Magluta argues that the law of the case doctrine does not apply here because in his first appeal we vacated his sentence "in its entirety." That we vacated his sentence does not mean that he is free to raise again contentions that we expressly decided against him in the first appeal.

Magluta asserts that we "expressly declined" to reach those two guidelines range calculation arguments in his last appeal. We disagree. It is true that we did not decide in the first appeal whether the funds calculation and criminal history determinations were correct. *See Magluta I,* 418 F.3d at 1183-85. We did, however, hold that even if they were incorrect it would not matter to his sentence. We explained that even if the district court had miscalculated the amount of the laundered money and had erred in determining his criminal history points, we would still affirm on the basis of the district court's statement that it would upwardly depart to make up any difference. *Id.* at 1183-84. That holding is enforced by the law of the case doctrine in this appeal.

Magluta also argues that the exception to the law of the case doctrine for intervening changes in the law applies. *See Schiavo,* 403 F.3d at 1292 (noting that the law of the case doctrine does not apply where "controlling authority has been rendered that is contrary to the previous decision" (internal quotation marks and citation omitted)). While it is true, as Magluta points out, that *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738 (2005), had not been decided at the time of his first sentencing, and as a result the district court did not consider the § 3553(a) factors in arriving at his original sentence, the change announced in *Booker* does not affect the guidelines calculation issues we resolved in the first appeal. And it is the guidelines calculation that Magluta is challenging with these arguments.

Moreover, given the district court's statement at the status conference it held before resentencing Magluta that it felt "even more comfortable" with its "reasons for departing," even if we were free to address the contentions anew, we would reach the same harmless error conclusion about them that we reached in the first appeal. *See id.*; *see also United States v. Hersh*, 297 F.3d 1233, 1248 (11th Cir. 2002).

Finally, we need not consider Magluta's argument that the district court erroneously applied a three-level enhancement under United States Sentencing Guidelines § 2J1.7 (Nov. 1998), because he waived that argument by not raising it in his first appeal. *See United States v. Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997) ("Under the law of the case doctrine, a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time." (quoting *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C.Cir. 1987))). We will not permit Magluta "two bites at the appellate apple." *See United States v.. Fiallo-Jacome*, 874 F.2d 1479, 1482-83 (11th Cir. 1989).

III.

Magluta also contends that the sentence the district court imposed is procedurally and substantively

unreasonable. He argues that it is procedurally unreasonable because the district court miscalculated the applicable guidelines range, but we have already addressed his arguments relating to the district court's calculation of the guidelines range. Magluta also argues that his sentence is substantively unreasonable because it is longer than the sentences others have received for similar crimes and is also longer than the sentences his co-defendants received.

When reviewing a sentence imposed by the district court, we must first determine whether the court correctly calculated the guideline range. *United States v. Winingear,* 422 F.3d 1241, 1245 (11th Cir. 2005). We then review the sentence for reasonableness in light of the factors set forth in 18 U.S.C. § 3553(a). *United States v. Martin,* 455 F.3d 1227, 1237 (11th Cir. 2006). We review only the final sentence for reasonableness, not each individual decision made during the sentencing process. *Winingear,* 422 F.3d at 1245. Reasonableness review is "deferential," and "the party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in light of both [the] record and the factors in section 3553(a)." *United States v. Talley,* 431 F.3d 784, 788 (11th Cir. 2005). As the Supreme Court recently explained, we "must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse-of-discretion standard." *Gall v. United States,* 552 U.S. ___, 128 S.Ct. 586, 591 (2007). When conducting this

review, we consider the totality of the circumstances. *Id.* at 597.

A guideline sentence may be reviewed for procedural or substantive unreasonableness. *United States v. Hunt,* 459 F.3d 1180, 1182 n.3 (11th Cir. 2006). A sentence is procedurally unreasonable if it stems from a procedure that failed to follow the requirements of *Booker. Hunt,* 459 F.3d at 1182 n.3. A sentence may be substantively unreasonable even if it is procedurally reasonable. *Id.*

Under § 3553(a), a sentencing court is charged with imposing a sentence that is "sufficient, but not greater than necessary" to reflect the seriousness of the offense, afford deterrence, protect the public from further crimes of the defendant, and provide the defendant with educational or vocational training, medical care or other treatment. 18 U.S.C. § 3553(a). The district court need not recite a laundry list of the § 3553(a) factors; some indication in the record that the court adequately and properly considered the applicable advisory guideline range and the § 3533(a) sentencing factors is sufficient. *United States v. Scott,* 426 F.3d 1324, 1329 (11th Cir. 2005).

The sentence imposed by the district court was both procedurally and substantively reasonable. The court calculated the applicable guidelines range, recognized the advisory nature of the guidelines, and considered the § 3553(a) factors in imposing Magluta's sentence. The resulting sentence was within the applicable guideline range, which is life

imprisonment.[2] The sentence imposed is procedurally reasonable.

The sentence is also substantively reasonable. As the district court noted, Magluta's crimes were serious and involved a wholesale corruption of our system of justice, *see* 18 U.S.C. § 3553(a)(2)(a), and his criminal activity began in the 1970s, *see id.* § 3553(a)(1). The district court also explained that it was imposing the 195-year sentence to protect society from Magluta and to deter others from engaging in similar criminal conduct. *See id.* § 3553(a)(2)(B), (C).

The district court specifically addressed the disparity between Magluta's sentence and the sentence imposed on one of his co-defendants, noting that the codefendant had entered into a plea agreement which affected his sentence. *See id.* § 3553(a)(6). The court also observed that Magluta's involvement in the plot to obstruct justice was much greater than any of his co-defendants. *See id.* Because the sentence the district court ultimately imposed is within the applicable guideline range, here life imprisonment, and because we see no abuse of discretion in the court's application of the § 3553(a) factors, we conclude that

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[2] Magluta's total offense level was 43, which regardless of the number of criminal history points the district court assigned to him, called for a sentence of life imprisonment. The district court imposed consecutive sentences for each of the counts on which Magluta was convicted to achieve a total sentence with the practical effect of the sentence called for by the guidelines. *See* U.S.S.G. § 5G1.2(d).

Magluta's sentence was also substantively reasonable. *See Talley,* 431 F.3d at 788.

Finally, Magluta argues that imposing consecutive twenty-year sentences for each money laundering offense and the money laundering conspiracy, for a total of 180 years, was unreasonable. We disagree. Only by stacking in this manner, could the district court sentence Magluta within the applicable guideline range in accord with U.S.S.G. § 5G1.2(d), which specifies:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

U.S.S.G. § 5G1.2(d). *See United States v. Davis,* 329 F.3d 1250, 1253-54 (11th Cir. 2003) (holding that § 5G1.2(d) requires sentences to run consecutively to the extent necessary to reach the guideline range).

IV.

Magluta's final contention is that the district court violated his Fifth Amendment privilege against self-incrimination by making remarks at a status conference before the resentence hearing suggesting

that it would only reconsider the length of his sentence if he confessed to the obstruction of justice count which we reversed in his first appeal. The government contends that we should review this claim only for plain error because it was not properly raised in the district court. Magluta argues that the motion for recusal he filed before the resentence hearing was sufficient to preserve this claim for review.

We review constitutional claims not timely raised in the district court only for plain error. *United States v. Moriarty,* 429 F.3d 1012, 1018-19 (11th Cir. 2005). We may, in our discretion, correct plain error where the defendant demonstrates that there is: (1) error, (2) that is plain, and (3) that affects substantial rights. If these three conditions are met, we may correct a plain error, but only if that error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 1019.

The Fifth Amendment provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. The privilege afforded by the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future

criminal proceedings." *Lefkowitz v. Turley,* 414 U.S. 70, 77, 94 S.Ct. 316, 322 (1973).

Magluta's motion for recusal was insufficient to preserve his Fifth Amendment claim for review. Nowhere in that motion did Magluta argue that the district court's statements at the status conference violated his rights under the Fifth Amendment. Instead, the motion sought recusal on the grounds that the district court had actively participated in plea bargaining and was biased against Magluta. Because those legal theories are different from the Fifth Amendment argument Magluta raises in this appeal, and requested different relief, we will review this issue only for plain error. *See generally United States v. Massey,* 443 F.3d 814, 819 (11th Cir. 2006) ("We have held that, for a defendant to preserve an objection to [his] sentence for appeal, [he] must raise that point in such clear and simple language that the trial court may not misunderstand it. When the statement is not clear enough to inform the district court of the legal basis for the objection, we have held that the objection is not properly preserved. The defendant also fails to preserve a legal issue for appeal if the factual predicates of an objection are included in the sentencing record, but were presented to the district court under a different legal theory." (internal quotation marks and citations omitted)).

We conclude that the district court did not commit plain error when it made the statements about which Magluta complains. None of the decisions he relies upon involve potentially coercive

statements delivered in the context of a status conference held to determine whether there would be any point in a full resentence hearing. Nor do those decisions address statements made outside the presence of the defendant. These distinctions are critical because even if the district court did err in saying what it said, the error would not be plain, because there is no controlling authority that deals with facts like those present in this case, and it is not self-evident the statement in the circumstances in which it was made violated the Fifth Amendment. *See United States v. Humphrey,* 164 F.3d 585, 588 (11th Cir. 1999) ("A plain error is an error that is obvious and clear under current law." (internal quotation marks omitted)); *see also United States v. Castro,* 455 F.3d 1249, 1253 (11th Cir. 2006) ("When the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it." (internal quotation marks and citations omitted)).

Moreover, even if we were to conclude that the district court did err and that the nature of the error was plain, we still would not reverse because Magluta's substantial rights were not affected. When we remanded this case after Magluta's first appeal, we instructed the district court that it could, "at its discretion, either reimpose Magluta's sentence but with a reduction of [ten years] as a result of there being no conviction for [one of the obstruction of justice counts], or the court may resentence Magluta

on all the other counts for which he remains convicted." *Magluta I,* 418 F.3d at 1186. The district court imposed the same sentence on remand, less the ten years for the obstruction of justice count which the government elected to dismiss.

In order to show that his substantial rights were affected by the district court's statement, Magluta would have to carry his burden of establishing that there is a reasonable probability he would have received a different sentence but for the district court's statement. *See United States v. Rodriguez,* 398 F.3d 1291, 1299-1302 (11th Cir. 2005). He has not done that.

AFFIRMED.

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Salvador MAGLUTA, a.k.a. Sal,
Defendant-Appellant.
No. 03-10694.

July 27, 2005.

Jack M. Denaro, Jack M. Denaro, P.A., G. Richard Strafer, G. Richard Strafer, P.A., Miami, FL, Bruce Rogow, Bruce S. Rogow, P.A., Fort Lauderdale, FL, for Defendant-Appellant.

Madeleine R. Shirley, Anne R. Schultz, U.S. Atty., Miami, FL, for U.S.

Appeal from the United States District Court for the Southern District of Florida.

Before CARNES and COX, Circuit Judges, and MILLS*, District Judge.

CARNES, Circuit Judge:

In August of 2002, a jury convicted Salvador Magluta of twelve counts: eight counts of laundering drug proceeds, and one count each of conspiracy to launder drug proceeds, conspiracy to obstruct justice, obstruction of justice by bribing a witness,

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* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

and obstruction of justice by bribing a juror. The jury also returned a special forfeiture verdict requiring Magluta to forfeit $15 million in currency, and also some real property.

In January of 2003, the district court sentenced Magluta to 2,460 months (205 years) in prison. The total sentence was rang up this way: 240 months on each of the eight substantive drug proceeds laundering counts; 240 months on the conspiracy to launder count; 60 months on the conspiracy to obstruct justice count; 120 months on the obstruction by bribing a juror count; and 120 months on the obstruction by bribing a witness count. Each sentence was made consecutive to every other one.

Magluta asserts that his convictions on a number of the counts must be reversed and also that his sentence was incorrectly calculated. First, he contends that his convictions on all nine of the money laundering counts (eight substantive and one conspiracy) must be reversed on collateral estoppel grounds. The basis for this contention is that six years before this trial he was acquitted of substantive drug offenses, and evidence of those offenses was used to prove the money laundering charges in this trial. Second, Magluta contends that the evidence was insufficient to support his convictions on the eight substantive money laundering counts.

Magluta's third and fourth contentions attack his conviction on the obstruction of justice through juror bribery count. He argues that it must be reversed

because the district court erred in admitting certain out-of-court statements of a bribed juror under the co-conspirator exception to the hearsay rule contained in Fed. R. Evid. 801(d)(2)(E). He also argues that this conviction must be reversed because the district court did not give a special unanimity instruction geared to the identity of the juror who was allegedly bribed.

Fifth, Magluta contends that documentary evidence vital to several of his convictions was seized and admitted at trial in violation of his Fourth Amendment rights thereby tainting some of his convictions. If we agree, he asks that we remand to the district court with instructions for it to determine which of his convictions were tainted by this assertedly erroneously introduced evidence. Finally, Magluta makes several arguments that his sentence was incorrectly calculated. We will address each of these six major contentions in the order we have listed them.

I.

Magluta's attack on his money laundering convictions in this case centers around his 1996 acquittal on all of the twenty-four drug-related counts against him. In that earlier case the district court granted judgments of acquittal on seven counts, and the jury acquitted Magluta of all of the remaining ones. Among the charges for which Magluta was acquitted in the earlier trial were: operating a continuing criminal enterprise from January 1978 through April

1991; conspiring to import and distribute cocaine during that same period of time; and engaging in a number of substantive drug importation and distribution offenses from 1986 through 1989. The continuing criminal enterprise count in that earlier case incorporated all of the conspiracy and substantive drug offenses that were separately charged in that case.

Magluta contends that the 1996 acquittal established that he was not involved in drug offenses during the periods of time charged in that case, which include the times when the crimes charged in this case took place. His position is that the government was collaterally estopped from introducing in this case evidence of drug offenses allegedly committed during the periods of time covered by the charges in the first case. The district court disagreed, and so do we.

The government did introduce in this case evidence of criminal activity for which Magluta had been acquitted in the earlier case. The money laundering conspiracy charged in this case involved criminal activity beginning in January 1979 and extending through December 2001, and the substantive money laundering charges involved criminal activity that occurred in October and December 1998. In proving those charges in this case, the government introduced evidence of illegal drug activities that had taken place between 1978 and 1991, which is the period of

time alleged in indictment in the earlier case where Magluta was acquitted.[1] The government used evidence of that criminal activity in order to establish in this case the "specified unlawful activity" element, 18 U.S.C. § 1956(a)(1)(B)(i), of the money laundering charges against Magluta.[2]

"The doctrine of collateral estoppel is a narrow exception to the Government's right to prosecute a defendant in separate trials for related conduct." *United States v. Brown,* 983 F.2d 201, 202 (11th Cir. 1993); *see also United States v. Garcia,* 78 F.3d 1517, 1521 (11th Cir. 1996). Collateral estoppel "bars a subsequent prosecution only where a fact or issue

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[1] As we say in the text, Magluta was acquitted in the 1996 trial of charges that he had committed drug offenses beginning in 1978. He said during that trial he had ceased all illegal drug activities in 1980. As a consequence of his having acknowledged that he had engaged in drug activities until some time in 1980, Magluta has narrowed the issue he is raising in this case to whether the government was collaterally estopped from attempting to prove that he engaged in illegal drug activities between 1980 and 1991.

[2] To prove that Magluta engaged in money laundering under 18 U.S.C. § 1956(a)(1)(B)(i), the government had to establish that: (1) Magluta conducted or attempted to conduct a financial transaction; (2) the transaction involved the proceeds of a statutorily specified unlawful activity; (3) Magluta knew the proceeds were from some form of illegal activity; and (4) Magluta knew a purpose of the transaction was to conceal or disguise the nature, location, source, ownership, or control of the proceeds. *See United States v. Majors,* 196 F.3d 1206, 1212 (11th Cir. 1999). Felony drug offenses qualify as a "specified unlawful activity" as that term is used in § 1956. *See* 18 U.S.C. §§ 1956(c)(7)(B)(i) & (A), 1961(1).

necessarily determined in the defendant's favor in the former trial is an essential element of conviction at the second trial." *Brown,* 983 F.2d at 202; *see also Garcia,* 78 F.3d at 1521.

Applying the collateral estoppel doctrine requires a two-step analysis:

> First, a court must decide whether it can ascertain the basis of the acquittal at the first trial. More precisely, a court must determine whether the jury's verdict of acquittal was based upon reasonable doubt about a single element of the crime which the court can identify. [Second], the court must then decide whether that element is also an essential element of the crime for which the defendant was convicted in the second trial.

Brown, 983 F.2d at 202. "'[T]he identity of overlapping elements required for collateral estoppel must extend beyond the legal definition of the elements.' There also has to be such factual identity of the issues that '[t]he subsequent verdict of conviction [is] rationally inconsistent with the prior verdict of acquittal.'" *Garcia,* 78 F.3d at 1521 (quoting *Brown,* 983 F.2d at 202). The burden of persuasion is on the defendant as to both steps of the analysis. *Id.; Brown,* 983 F.2d at 202.

As for the first step, Magluta argues that the basis of his 1996 acquittal was that he had ceased all drug trafficking activities in May 1980. This has to have been the basis for his acquittal, Magluta says, because it was the only defense he put forward to the

crimes alleged in his 1996 trial. We can assume without deciding that Magluta is right about this point, and thereby satisfies the first step of the collateral estoppel test, because he does not satisfy the second one.

The second step of the collateral estoppel test requires Magluta to establish that the elements of the crime on which the prior acquittal was based are also essential elements of the crime for which he was convicted at the second trial. *See Garcia,* 78 F.3d at 1521; *Brown,* 983 F.2d at 202. That is to say, Magluta must show that the elements of the drug offenses which led to his acquittal in the 1996 trial are essential elements of the money laundering offenses for which he was convicted in this case.

Even if we accept for present purposes Magluta's premise that his 1996 acquittal established he was not involved in the illegal drug activity with which he had been charged in that earlier case, his argument still fails. It fails because Magluta's personal involvement in, or guilt of, the criminal activity charged in the earlier case is not an element of the money laundering charge he was convicted of in this case. This indictment charged Magluta with money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i), with the specified unlawful activity being felony drug offenses. The government had to prove that Magluta, with the requisite knowledge and intent, conducted a financial transaction involving the proceeds of felony drug offenses. *See Majors,* 196 F.3d at 1212. The government did not have to prove, however, that Magluta

committed the felony drug offenses. *See id.* As far as the money laundering statute is concerned, laundering someone else's illegal proceeds is just as bad as laundering your own – there is no help-thy-neighbor exception to § 1956(a)(1)(B)(i). Accordingly, the collateral estoppel effect of Magluta's 1996 acquittal of illegal drug activity does not extend to any of the essential elements of the money laundering charges on which he was convicted in this case.

II.

Magluta challenges the sufficiency of the evidence to support his convictions on the eight substantive money laundering counts. While phrased in sufficiency of the evidence terms, Magluta's actual challenge here raises the issue of whether the relevant facts, which are essentially undisputed, constitute money laundering. As we have mentioned, Magluta was convicted of money laundering conducted for the purpose of concealing the nature, location, source, ownership, or control of the illegal drug proceeds, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). The charges and evidence centered on the fact that Magluta had paid his lawyers with checks written from an Israeli bank account held under a fictitious name.

On September 10, 1998, Richard Passapera, a Magluta associate, delivered $1.2 million in illegal drug proceeds to Antonio Garcia, another Magluta associate, in Miami. Unbeknownst to Passapera and

Magluta, however, Garcia had become an FBI informant. Garcia turned the money over to the FBI, which transported it to New York where it gave the money back to Garcia in order to complete the transaction. In New York, Garcia gave the money to Harry Kozlik and Isaac Benatar, who were also Magluta associates. Kozlik transported the money to Israel and deposited it in an Israeli bank under the fictitious name of "Leonard Friedman." Kozlik eventually provided Garcia with eight blank checks issued from the account. Garcia, at the direction of the FBI, passed the checks on to Passapera. Magluta then used the checks to pay his lawyers.

Magluta makes three arguments to support his position that the established facts about what happened to the drug proceeds are not sufficient to make out money laundering. His first argument is that, because the proceeds had been under the control of law enforcement before he used them to pay his lawyers, the money had lost its "tainted" character and was no longer proceeds of a specified illegal activity in the sense required by § 1956(a)(1)(B)(i). Unable to find a money laundering decision of any court on point with his position, Magluta asks us to draw an analogy to stolen property cases, where property loses its "stolen" character once it is recovered and controlled by law enforcement. *See, e.g., United States v. Cohen,* 274 F. 596, 599 (3d Cir. 1921). We are not persuaded to do that.

The plain language of the money laundering statute requires that the "financial transaction . . . in

fact involves the proceeds of [a] specified unlawful activity." 18 U.S.C. § 1956(a)(1). But there is nothing in the statutory language to suggest that, in addition to being from a specified unlawful activity, the proceeds must never have been in the control of the government before they reached the defendant. It seems to us that laundered money does not become any less laundered because the government helped the process along or chose not to stop it. Having said that, we are not asked to decide whether government intrusion into laundering transactions ever could rise to the level that the money no longer qualifies as the "proceeds of [a] specified unlawful activity" under § 1956(a)(1). All we must decide here is whether the level of government involvement in this case was enough to change the nature of the proceeds. On the facts of this case, it was not.

Magluta's second argument is that allowing actual drug proceeds which have been in the possession of the government to form the basis for a conviction under § 1956(a)(1) would make the money laundering "sting" statute, 18 U.S.C. § 1956(a)(3), superfluous.[3] Sections 1956(a)(1) and 1956(a)(3) cover

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[3] 18 U.S.C. § 1956(a)(1) states:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which *in fact* involves the proceeds of specified unlawful activity –
>
> . . . .

(Continued on following page)

different situations. The (a)(1) subdivision covers situations where the proceeds are actually from a specified unlawful activity. 18 U.S.C. § 1956(a)(1). The (a)(3) subdivision covers situations where the government, or some person at the direction of the

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(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

. . . .

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

Id. (emphasis added).

18 U.S.C. § 1956(a)(3) states:

Whoever, with the intent –

. . . .

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

. . . .

conducts or attempts to conduct a financial transaction involving property *represented to be* the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both.

Id. (emphasis added).

government, represents that the proceeds are from a specified unlawful activity though in reality they are not. *Id.* § 1956(a)(3). The two provisions serve different purposes. Neither provision is rendered superfluous by our holding that the level of government involvement in the laundering in this case was not enough to cleanse these "proceeds of specified unlawful activity" of their taint for § 1956(a)(1)(B)(i) purposes.

Magluta's third argument on this issue is that by the time he wrote the checks to his lawyers the money had already been laundered; therefore, he says, his acts amounted to mere spending for his personal benefit, not laundering in violation of § 1956(a)(1)(B)(i). We have stated that payments for personal benefit out of previously laundered proceeds do not themselves constitute money laundering unless they are designed to conceal the nature or source of the money. *See Majors,* 196 F.3d at 1213 (internal quotation and marks omitted).

We have set out several factors that are helpful in determining whether a transaction was designed to conceal as required by § 1956(a)(1)(B)(i). "Evidence that may be considered when determining whether a transaction was designed to conceal includes, among others, statements by a defendant probative [o]f intent to conceal; unusual secrecy surround[ing] the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to

conceal the real owner; a series of unusual financial moves cumulating in the transaction; or expert testimony on practices of criminals." *Id.* at 1213 n.18 (emphasis omitted).

Magluta paid his lawyers with checks written on an Israeli bank account held in a fictitious name. The several transfers of cash between Magluta associates, the movement of the cash from Miami to New York to Israel, and the use of a foreign account held in a false name are "a series of unusual financial moves" which culminated in Magluta writing the checks. *See id.* There thus was an air of "unusual secrecy surround[ing] the transaction[s]." *See id.* Magluta's use of his associates, as well as the fictitious "Leonard Friedman," demonstrate his use of "third parties to conceal the real owner" of the money in the foreign account. *See id.* The final transaction itself – Magluta writing checks on a foreign account held in a false name – is "highly irregular." *See id.*

In sum, Magluta went to great pains to conceal the fact that he was using drug proceeds to pay his lawyers. His doing so meets the definition of money laundering for purposes of § 1956(a)(1)(B)(i), even if the final transfer of the laundered proceeds was also for Magluta's personal benefit. *See Majors,* 196 F.3d at 1213 & n.18; *cf. United States v. Abbell,* 271 F.3d 1286, 1298 (11th Cir. 2001) ("We believe it is enough for [§ 1956(a)(1)(B)(i)] that [the] Defendants engaged in transactions from which Rodriguez-Orejuela received a benefit (and moneys were paid on behalf of Rodriguez-Orejuela) while concealing that

Rodriguez-Orejuela was the source of the funds."). Magluta's convictions on the substantive money laundering counts stand.

III.

Magluta's third major contention is that his conviction for obstruction of justice through juror bribery must be reversed because the district court erred in admitting two out-of-court statements made by Miguel Moya, who had been the jury foreman in the 1996 trial. The government used those statements to prove that Magluta had bribed Moya to produce an acquittal in that earlier case.

The first of the two statements in question was made by Moya to undercover FBI Agent Joaquin Garcia in a recorded conversation that took place in July 1998. In that conversation Garcia told Moya that he had been sent by Magluta (and Magluta's co-defendant in the 1996 trial, Augusto Falcon) to ensure that Moya kept quiet about the bribe he had received two-and-a-half years earlier. After prodding by Garcia, Moya acknowledged having accepted that bribe from Magluta and his co-defendant Falcon.[4] Moya assured Garcia that only his wife and parents knew he had received the bribe money, and he

[4] We have no way of knowing exactly how large the bribe was that Moya received. The record does show, however, that although Moya and his family were of modest means, they made $330,000 in cash expenditures and bank deposits in the twenty-seven months following the trial.

promised Garcia that he would not cooperate with authorities.

The court admitted Moya's statements as non-hearsay statements of a co-conspirator under Fed. R. Evid. 801(d)(2)(E). "We review the district court's evidentiary rulings for an abuse of discretion," *United States v. Hasner*, 340 F.3d 1261, 1274 (11th Cir. 2003), and we may overturn findings of fact only if clearly erroneous, *United States v. Griggs*, 735 F.2d 1318, 1325 (11th Cir. 1984).

"Under Rule 801(d)(2)(E), statements of co-conspirators made during the course and in furtherance of the conspiracy are not hearsay. For evidence to be admissible under Rule 801(d)(2)(E), the government must prove by a preponderance of the evidence these things: (1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the statement was made during the course and in furtherance of the conspiracy. In determining the admissibility of co-conspirator statements, the trial court may consider both the co-conspirator's statements and independent external evidence." *Hasner*, 340 F.3d at 1274. In ruling on the admissibility of the conversation between Moya and Agent Garcia under Rule 801(d)(2)(E), the district court found that:

> [T]his conspiracy continued to exist up through July of 1998, when this statement was made. The Court does find that although Mr. Moya's participation was in just one component, he was a participant in the overall

> scheme. He would not have known all of the ins and outs of the conspiracy that's charged in this Indictment, but . . . in agreeing to . . . accept[ ] the bribe for convincing the other jurors to return a judgment of acquittal, he is still a member of the conspiracy.
>
> He sat and listened to the evidence in the case . . . that Mr. Falcon and Mr. Magluta were participants in a major drug trafficking organization; that the monies that were connected with them were proceeds of a major drug trafficking organization. . . . I find that the government has proved by a preponderance of the evidence that . . . [Moya] knew that the [bribe] money was from a specified unlawful activity and, therefore, he took actions to cover up his sudden found wealth in creating all of the various gifts of funds to his relatives and near relatives and friends. . . . So his participation and his actions continue to evidence efforts to cover up his criminal acts. The law does find that such conduct of covering up the acts are part and parcel of the conspiracy.

Magluta argues that if he and Moya conspired to obstruct justice through juror bribery, the central purpose of that conspiracy ended, at the latest, once the verdict in the earlier case was rendered in February 1996. As a result, according to Magluta, Moya's conversation with the undercover FBI agent, which took place in July 1998, was not made during the course of the juror bribery conspiracy but instead came well after the conspiracy had ended.

In *Grunewald v. United States,* 353 U.S. 391 (1957), the Supreme Court held that: "[A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." 353 U.S. at 401-02. The Court also recognized that "a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." *Id.* at 405.

The central purpose of the juror bribery conspiracy between Magluta and Moya was to secure an acquittal for Magluta in return for cash. Once the verdict was rendered, that central purpose was completed. Although it was mutually understood that Magluta and Moya would conceal the bribe, in the Supreme Court's words, those "[a]cts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators." *Id.* at 402. In light of *Grunewald,* we cannot infer that a subsidiary conspiracy to conceal the bribe Magluta had given Moya existed for almost two-and-a-half-years after the bribery agreement had been made and carried out. *See id.* at 401-02. As a

result, Moya's statement to Agent Garcia was not in furtherance of the conspiracy to obstruct justice through juror bribery.

The government argues, and the district court's findings indicate it believed, that Moya's statements are admissible under Rule 801(d)(2)(E) on the ground that it was in furtherance of another conspiracy. Under this theory, there was a conspiracy between Magluta and Moya to launder drug proceeds in violation of § 1956(a)(1)(B)(i). That conspiracy would have begun when Moya accepted the bribe from Magluta, which was paid out of illegal drug proceeds, and it was still ongoing at the time Moya assured Agent Garcia that he would keep quiet about it.[5]

We will assume for the moment that Moya's acceptance of the bribe made him and Magluta participants in a conspiracy to launder drug proceeds under 18 U.S.C. § 1956(a)(1)(B)(i). *Cf. Abbell,* 271 F.3d at 1298 (affirming the defendant lawyers' convictions for violating § 1956(a)(1)(B)(i) where the lawyers gave money to certain inmates while concealing that the money was being paid at the direction of and on behalf of the lawyers' client). Even with that assumption the argument fails under *Grunewald,* because

[5] That this conspiracy was not charged in the indictment in this case does not matter. *United States v. Salisbury,* 662 F.2d 738, 740 (11th Cir. 1981) ("Statements of a coconspirator may be introduced into evidence even though the government has not charged [the coconspirator] with conspiracy as long as the existence of the conspiracy has been properly established.").

Moya's statements to Agent Garcia were not made during the course of and in furtherance of that money laundering conspiracy.

As we mentioned before, Moya's statements to Agent Garcia occurred two-and-a-half years after Moya accepted the bribe. Assuming Magluta's payment of the bribe to Moya constituted a conspiracy between them to launder drug proceeds in the amount of the bribe, the evidence does not support an inference that the initial conspiracy included a "subsidiary conspiracy to conceal" which was ongoing so long after the bribe – the single act of money laundering – had occurred. *See Grunewald,* 353 U.S. at 401-02.

Moya's statements to Agent Garcia do constitute an attempt to keep any initial conspiracy secret, but that attempt is not enough by itself to establish the coverup two-and-a-half years later was part of the initial agreement between Magluta and Moya. As the Supreme Court explained: "[E]very conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." *Id.* at 402.

That Moya tried to hide the source of the funds he used to make purchases for himself and his family does not bring those acts into any earlier drug laundering conspiracy between Magluta and Moya. Whatever crimes Moya may have committed by concealing the source of the funds that he used to pay for his purchases, there is no evidence to suggest that making them was part of the initial conspiracy between him and Magluta. Otherwise, the government could have charged Magluta with money laundering for every purchase Moya made with the bribe proceeds; that would not be a reasonable interpretation of the conspiracy and money laundering laws. Because the later transactions that Moya engaged in were not part of the "initial agreement" between him and Magluta, *see Grunewald*, 353 U.S. at 402, they do not extend the life of the money laundering conspiracy that began in January of 1996 to include Moya's July 1998 statements to Agent Garcia. As a result, the district court should not have admitted Moya's statements to Agent Garcia pursuant to Rule 801(d)(2)(E).

The government argues that, even if the district court erred by admitting Moya's statements to Agent Garcia, the error was harmless because it presented other evidence to support the obstruction of justice through juror bribery conviction. As we have previously made clear, a "non-constitutional error is harmless if, viewing the proceedings in their entirety, a court determines that the error did not affect the verdict, 'or had but very slight effect.'" *United States v. Hornaday*, 392 F.3d 1306, 1315 (11th Cir. 2004)

(citations omitted) (quoting *Kotteakos v. United States,* 328 U.S. 750, 762, 764 (1946)). Furthermore, "[i]f one can say 'with fair assurance . . . that the judgment was not substantially swayed by the error,' the judgment is due to be affirmed even though there was error." *Id.* at 1315-16 (quoting *Kotteakos,* 328 U.S. at 764). The government has not met this standard.

Moya's statements to Agent Garcia constituted the evidence directly tying Magluta to the bribe. Even if we were to consider Moya's statement to his then-wife (the other statement that Magluta asserts was erroneously introduced), we are left only with the conclusion that Moya was bribed, not that it was Magluta who paid the bribe.[6] Although common sense would suggest that Magluta was involved, Magluta was being tried with a co-defendant who had as much reason to bribe jurors as Magluta did. With no other direct evidence linking Magluta to the bribe, we

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[6] Moya's ex-wife testified that on January 31, 1996 (which was during Magluta's previous trial) at approximately six o'clock in the evening Moya received a telephone call at home from a man named Eddy. In response to the call Moya left the house, and two to three hours later came back carrying a brown paper bag. Ms. Moya asked him what was in it. He showed her the contents of the bag: bundles of cash. She testified that when she asked Moya what the money was for, "[h]e said it was given to him in order to persuade the jury in the trial that he was on." According to Ms. Moya, when she asked her husband why he had taken the bribe, Moya told her that "[h]e had to do it," and "he couldn't get out of what he was doing." She did not testify that Magluta was mentioned.

"cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error." *See Kotteakos,* 328 U.S. at 765. The error, therefore, was not harmless. For these reasons, Magluta's conviction for obstruction of justice through juror bribery is due to be reversed.[7]

IV.

Magluta's fourth contention is that his conviction on the obstruction of justice through juror bribery count must be reversed for an additional reason. He argues that the district court erred when it failed to instruct the jurors in this case not to convict on this count unless they unanimously agreed on which juror or jurors Magluta had bribed in the earlier case. Because we have already decided to reverse the conviction on this count for other reasons, we need not address this contention any further.

V.

Magluta's fifth contention is that the district court erred by denying his motion to suppress cer tain documents seized on October 15, 1996. Those documents were found inside a box that was seized without a warrant from the trunk of a car driven by Marilyn Bonachea, an associate of Magluta. Magluta

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[7] In light of this conclusion, we have no reason to address the issue Magluta has raised involving the admission of the statements Moya made to his wife at the time.

argues that the officers lacked probable cause to search the box of documents and, as a result, his Fourth Amendment rights were violated.

On October 15, 1996, which was after Magluta was acquitted in the first trial, Guy Lewis, then an Assistant United States Attorney in Miami, received an anonymous telephone call. The caller advised Lewis that later that morning Bonachea would be transporting certain documents from her home to the office of Magluta's lawyer. Lewis knew Bonachea was a close associate of Magluta. The caller said that the documents Bonachea would be transporting contained information relating to the ongoing Magluta investigation, including information about how drug money had been used to bribe individuals to give false testimony in the earlier trial. The caller said that Bonachea would be leaving her home in south Dade County at a specified time and gave the address. The caller also told Lewis that Bonachea would be driving a rental car, which the caller described, and that Bonachea commonly smoked marijuana when driving.

This was the second call AUSA Lewis had received from this anonymous caller. The previous call had provided Lewis with an address for Bonachea's son at Bonachea's home, the same address from which the caller said that Bonachea would be leaving later that day.

Immediately after receiving the second call, AUSA Lewis contacted Special Agent Jane Anglestead

of the Drug Enforcement Agency and Sergeant Robert Fielder of the Miami Police Department, both of whom were investigating Magluta and knew of his intimate relationship with Bonachea. Anglestead had been involved in prosecutions of Magluta since 1991. She knew from Bonachea's testimony in those cases that she had been associated with Magluta for a long time. Anglestead was also aware that at some time in the 1980s Bonachea had received approximately $585,000 from Magluta for the purchase of a house in South Florida, a house that was located adjacent to Magluta's property. Anglestead knew that two of the checks used for the house had come from a Bahamian account that Magluta maintained under another name. Furthermore, Anglestead was aware that Bonachea had frequently visited Magluta while he was incarcerated in a federal detention center awaiting trial. Based on this knowledge, Anglestead surmised that Bonachea might very well have the kind of documents described by the anonymous caller.

Shortly after being told by AUSA Lewis of the anonymous call earlier in the day, Agent Anglestead went to Bonachea's residence. The residence was at the address the caller had said it was. There Anglestead saw a rental vehicle matching the caller's description, and watched Bonachea leave the house within twenty minutes of the time that the caller had predicted. Florida Highway Patrol officers, who had been contacted by Sergeant Fielder, followed Bonachea.

After determining that Bonachea was speeding, the officers pulled her over. They confirmed with her that the car was a rental. One trooper noticed what appeared to be marijuana seeds in the ashtray. As a result, he called in a drug dog who, after examining the car, alerted to the console area where two marijuana cigarettes were then found. Bonachea was arrested and the trooper inventoried the vehicle, noting the parcels of paperwork in the trunk. Sergeant Fielder then arrived at the scene and informed Bonachea that he was going to inspect the vehicle. Bonachea objected, claiming that there were documents in the trunk stamped "attorney-client privilege." Fielder proceeded to open the trunk and found a cardboard box containing, among other things, what he recognized as drug ledgers.

The magistrate judge's report recommended that Magluta lacked standing to object to any alleged violation of the Fourth Amendment and that, in any event, law enforcement had probable cause to search the trunk. The district court, with the exception of two factual details not relevant here, adopted the magistrate judge's factual findings and legal conclusions and denied Magluta's motion to suppress.

Magluta challenges both the district court's decision that he lacked standing and its decision that law enforcement had probable cause to search Bonachea's trunk. "[W]e apply a mixed standard of review to the district court's denial of the suppression motion, reviewing the court's findings of fact for clear error and its application of the law to those

facts *de novo.*" *United States v. Tinoco,* 304 F.3d 1088, 1116 (11th Cir. 2002). Because we find that the district did not err in determining that the law enforcement officers had probable cause to search the contents of Bonachea's car, we will assume, without deciding, that Magluta has standing to allege a Fourth Amendment violation.

In most circumstances, for a search that is not based on consent to comply with the Fourth Amendment, law enforcement must obtain a warrant supported by probable cause. There are, however, exceptions. Under the automobile exception to the warrant requirement, officers can search any container in an operational car without a warrant as long as they have probable cause to believe that the container holds evidence of a crime. *California v. Acevedo,* 500 U.S. 565, 579-80 (1991); *United States v. Watts,* 329 F.3d 1282, 1286 (11th Cir. 2003). Because there is no dispute that the car Bonachea was driving was operational, our inquiry is limited to determining whether the officers had probable cause to believe that the box in her car contained evidence of a crime. *See Watts,* 329 F.3d at 1286. "Probable cause for a search exists when under the totality of the circumstances 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Goddard,* 312 F.3d 1360, 1363 (11th Cir. 2002) (quoting *Illinois v. Gates,* 462 U.S. 213, 238 (1983)).

Under the circumstances of this case, the anonymous tip received earlier in the same day is

entitled to substantial weight in the analysis of whether law enforcement had probable cause to believe that the box in Bonachea's trunk contained evidence of criminal activity. *See generally Gates,* 462 U.S. at 237-39 (noting that anonymous tips are considered in the probable cause determination). In addition to notifying law enforcement that Bonachea's car would be carrying documents evidencing drug activity, the caller provided the correct location of Bonachea's residence, an accurate description of the rental car she would be driving, and predicted that Bonachea would depart within twenty minutes of the time she actually did. The caller was also correct about Bonachea's smoking marijuana in the car. (A fact discovered after the car was lawfully stopped for speeding.) All of this information from the caller was corroborated by law enforcement officers before the box in the trunk of Bonachea's car was searched. *See id.* at 241 ("Our decisions applying the totality-of-the-circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work.").

Furthermore, on a previous occasion, this same caller had provided AUSA Lewis with the address where Bonachea's son was staying. That was the same address that Bonachea left from on October 15, 1996, as the caller had said she would, and at about the time the caller had said. The law enforcement officers were also aware of Bonachea's intimate relationship with Magluta, that she knew his organization, and that she often visited him in jail. From

these facts, they reasonably inferred that Bonachea was a person likely to be holding for Magluta the kind of documents described by the anonymous caller. All of these pieces of information bolster the caller's credibility.

Based on the totality of the circumstances leading up the search, we conclude that the district court did not err in holding that the law enforcement officers had probable cause to believe that the box located in the trunk of Bonachea's rental car contained evidence of a crime.

VI.

The remainder of Magluta's contentions attack his 205-year sentence. Because we have already decided that Magluta's conviction for obstruction of justice through juror bribery must be reversed, on remand it will be necessary for the district court to strike the 120-month sentence imposed for that count. Striking that 120-month sentence will leave Magluta with a sentence of 195 years imprisonment.

Magluta contends that this remaining portion of his sentence must be vacated for other reasons. For one thing, he argues that the district court erred in determining that the value of the drug money he had laundered was $35,498,957.80, a determination that affected his total offense level. According to Magluta, the jury's special forfeiture verdict of $15 million should have been a cap on the value of the funds that the district court could find were involved in the

money laundering scheme for purposes of calculating his specific offense characteristics pursuant to U.S.S.G. § 2S1.1(b)(2) (2000). If Magluta is correct about this, his total offense level should have been 41 instead of 43. *See* U.S.S.G. § 2S1.1(b) (2000).

Magluta casts this argument in collateral estoppel terms, saying that "[t]he district court violated principles of collateral estoppel by refusing to accept the jury's special forfeiture verdict of $15 million as a cap on the 'value of the funds' laundered." Appellant's Initial Br. at 51. The court was collaterally estopped, according to Magluta, because the jury's forfeiture inquiry matches exactly the § 2S1.1(b)(2) inquiry the judge was to make at sentencing, and the same preponderance of the evidence standard of proof was applicable to the jury and the judge.

We need not decide if the district court erred in calculating Magluta's offense level using an amount greater than the $15 million figure that the jury found in its special forfeiture verdict, because we would not vacate the sentence even if the court did. Having reviewed the record, we are convinced that any error of that nature was harmless. *See United States v. Hersh*, 297 F.3d 1233, 1248 (11th Cir. 2002) (sentencing errors are reviewed for harmless error). During the course of the sentencing hearing, the district court stated: "Should the Eleventh Circuit determine that the Court's reasoning [in arriving at the guidelines range] is in error, I would employ an upward departure to impose a sentence outside of the Guideline range under the applicable law to reach the

same result. And that is a departure to offense level 43 requiring a life sentence." Sentencing Tr. at 691. In other words, the district court said that it would get to an offense level of 43 one way or the other.

The district court recognized that it "must impose a sentence within the Sentencing Guidelines unless [it] determines that there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines." Sentencing Tr. at 692. After discussing the permissible grounds for upward departures, the district court concluded that, if necessary to get to an offense level of 43, an upward departure would be warranted in this case based on "the anomaly created by the obstruction" resulting in Magluta's 1996 acquittal, as well as other non-specified factors that were present in this case. Apparently, the anomaly the district court was referring to had to do with the fact that, through his illegal conduct, Magluta escaped the punishment he deserved for the criminal conduct he was tried for in his 1996 trial. In summing up, the district court stated that "the bribery of jurors, the bribery of witnesses, so goes to the heart of our criminal justice system which is the foundation of our democracy that the egregious nature of the offense here could only be recognized by an upward departure, and that the present Sentencing Guidelines do not take it into consideration, and that for those

reasons the Court would upward depart."[8] Sentencing Tr. at 694-95.

If the district court had upwardly departed, we would review that decision only for abuse of discretion. *United States v. Melvin,* 187 F.3d 1316, 1320 (11th Cir. 1999). Furthermore, "[b]ecause the district courts see so many Guidelines cases, district courts have an institutional advantage over appellate courts in determining whether a case is outside the heartland, and thus their decisions are entitled to substantial deference." *Id.* (citing *Koon v. United States,* 518 U.S. 81, 98 (1996)). With that in mind, we cannot say that the district court would have abused

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[8] Our reversal of Magluta's conviction for obstruction by bribing a juror does not undermine the factual premise of the district court's preemptive departure decision. Our reversal was based on our conclusion that the juror's out-of-court statements to the undercover agent were hearsay; that is, the statements did not fit within Fed. R. Evid. 801(d)(2)(E). However, it is well-established that, in sentencing, a district court can consider hearsay even if it was not admissible in determining guilt, so long as there are sufficient indicia of reliability. *United States v. Wilson,* 183 F.3d 1291, 1301 (11th Cir. 1999) ("A court may consider any information (including hearsay), regardless of its admissibility at trial, in determining whether factors exist that would enhance a defendant's sentence, provided that the information is sufficiently reliable."); U.S.S.G. § 6A1.3(a) ("[T]he court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."); *see also* 18 U.S.C.A. § 3661. The tape-recorded statements of the juror to the undercover agent clearly have sufficient indicia of reliability for this purpose.

its discretion in upwardly departing. *See* U.S.S.G. § 5K2.0 (describing permissible grounds for upward departures). As a result, any two-point error in Magluta's offense level was harmless.

Magluta also contends that the district court erred in calculating his criminal history score. Specifically, he asserts that the district court impermissibly considered his previous convictions as "prior sentences" under U.S.S.G. § 4A1.1(a). This is error, Magluta says, because his previous convictions were all "part of the instant offense" under § 4A1.2(a)(1), even though they occurred before this trial began. If Magluta were correct about this, his criminal history score was miscalculated. We need not decide whether this argument has any merit, for much the same reason we did not have to decide whether Magluta's argument about his offense level had any merit. The district court gave a valid basis for an upward departure to an offense level of 43 and that departure would not have been an abuse of discretion. Because an offense level of 43 mandates a life sentence regardless of the criminal history category, U.S.S.G. ch. 5, pt. A, any error in the calculation of Magluta's criminal history score is harmless.

Magluta's next assertion is that the district court erred by ordering each of the sentences for his convictions to run consecutively pursuant to U.S.S.G. § 5G1.2(d). He concedes that this position is foreclosed by our decision in *United States v. Davis*, 329 F.3d 1250 (11th Cir. 2003) (per curiam). That decision held § 5G1.2(d) requires that sentences run

consecutively to the extent necessary to reach the punishment range set by the guidelines. *Id.* at 1253-54. Magluta argues, however, that *Davis* has been invalidated by *United States v. Booker,* 543 U.S. ___, 125 S. Ct. 738 (2005). It has not been. *Booker* invalidated neither § 5G1.2(d) nor *Davis.* Instead, as one of our post-*Booker* decisions explained, *Booker* held that "the Sixth Amendment right to trial by jury is violated where under a mandatory guidelines system a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury." *United States v. Rodriguez,* 398 F.3d 1291, 1298 (11th Cir.) (emphasis omitted), *cert. denied,* ___ U.S. ___, 125 S. Ct. 2935 (2005). The *Booker* decision also established that it is "error for the district court to sentence [a defendant] under a mandatory Guidelines scheme, even in the absence of a Sixth Amendment enhancement violation." *United States v. Shelton,* 400 F.3d 1325, 1330-31 (11th Cir. 2005). To remedy the situation, the Court in *Booker* effectively rendered the guidelines advisory. *See Booker,* 125 S. Ct. at 764. The *Booker* decision affected *Davis* only to the extent that all guidelines decisions are now advisory. *Davis*' holding as to the proper application of § 5G1.2(d) remains correct and binding.

Magluta also makes the broader argument that he is entitled to resentencing under *Booker* because he was sentenced under a mandatory guidelines system. This *Booker* argument was raised for the first time in Magluta's reply brief. As we indicated in

our previous order granting in relevant part the government's motion to strike the portions of Magluta's reply brief raising this *Booker* argument, *United States v. Magluta,* No. 03-10694 (11th Cir. Nov. 17, 2004), an appellant may not raise an issue for the first time in a reply brief. *See United States v. Vanorden,* 414 F.3d 1321, 1322-23 (11th Cir. 2005) (per curiam); *United States v. Dockery,* 401 F.3d 1261, 1262-63 (11th Cir. 2005) (per curiam); *United States v. Ardley,* 242 F.3d 989, 990 (11th Cir. 2001) (per curiam). As a result, Magluta has abandoned this argument.

However, even if Magluta's *Booker* argument had not been abandoned because of his failure to raise it in his initial brief, he would still not be entitled to resentencing. Having failed to raise that issue in the district court, our review would be only for plain error. *Rodriguez,* 398 F.3d at 1298. As part of satisfying the plain error test, a defendant "must establish a reasonable probability that if the district court had considered the guidelines range it arrived at using extra-verdict enhancements as merely advisory, instead of mandatory, and had taken into account any otherwise unconsidered § 3553 factors, the court would have imposed a lesser sentence than it did." *Id.* at 1302. There is no evidence at all in the record to suggest that the district court would have imposed a lesser sentence than it did had it applied the guidelines in an advisory instead of mandatory manner. To the contrary, the court made it abundantly clear that

it would have given Magluta a life sentence regardless.

VII.

For the foregoing reasons, all of Magluta's convictions are AFFIRMED, except for the one for obstruction of justice through juror bribery, count 8, which is REVERSED. Magluta's sentence is VACATED, and the case is REMANDED.

If the government elects to dismiss count 8 instead of retry Magluta on that charge, or if a retrial on that count occurs and he is acquitted, the district court shall, at its discretion, either reimpose Magluta's sentence but with a reduction of 120 months as a result of there being no conviction for count 8, or the court may resentence Magluta on all the other counts for which he remains convicted. If the government elects to retry Magluta on count 8 and he is re-convicted of that charge, the district court shall then re-sentence him on all the counts.

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16505

D.C. Docket No. 99-00583-CR-PAS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SALVADOR MAGLUTA, a.k.a. Sal,
AUGUSTO GUILLERMO FALCON, a.k.a. Willy,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(September 5, 2001)

Before TJOFLAT, CARNES and REAVLEY*, Circuit Judges.

PER CURIAM:

Augusto Falcon and Salvador Magluta appeal the district court's denial of their joint motion to dismiss

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* Honorable Thomas M. Reavley, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

on double jeopardy and collateral estoppel grounds parts of the pending indictment against them.

Insofar as the double jeopardy grounds are concerned, we affirm the district court's order for the reasons set out in the magistrate judge's report and recommendation, which was adopted by the district court.

As for the collateral estoppel grounds, our appellate jurisdiction is limited to the denial of the motion to dismiss, and it does not extend to any issues about whether evidence should be excluded on collateral estoppel grounds. *See United States v. Mock*, 604 F.2d 336 (5th Cir. 1979). The defendants contend that the basis of their acquittal on the charges contained in the 1991 indictment is that they stopped trafficking cocaine after their arrests in 1980. Even assuming that premise for purposes of the present discussion, it does not follow that collateral estoppel bars any part of the present prosecution. A finding that the defendants did not themselves engage in cocaine trafficking offenses after any particular date would not preclude a finding that they laundered the proceeds of controlled substances offenses, and conspired to do so, as charged in the present indictment. The defendants' arguments about the government's intended proof and whether certain evidence may be used to prove the elements of the present indictment go to evidentiary issues that we may not review in this interlocutory appeal. *See Mock*, 604 F.3d at 338-40. We imply no view on those issues which are the type that this Court can only decide in an appeal from a

final judgment. Nor do we imply any view on what we have only assumed for purposes of this present decision, which is the basis of the acquittal on the charges contained in the 1991 indictment.

AFFIRMED.

By: /s/ [illegible]
Deputy Clerk
Atlanta Georgia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 99-583-CR-SEITZ

UNITED STATES OF AMERICA,

Plaintiff,

v.

AUGUSTO GUILLERMO FALCON
and SALVADOR MAGLUTA, et al.,

Defendants /

ORDER DENYING MOTION TO DISMISS

(Filed Nov. 29, 2000)

This matter is before the Court on Defendants' Objections to the Magistrate Judge's Report and Recommendation that this Court deny the Defendants' Joint Motion to Dismiss. That motion seeks to dismiss the money laundering and forfeiture counts of the Fourth Superseding Indictment and to strike specified overt acts of money laundering in Count I on the grounds of double jeopardy and collateral estoppel. The Court has reviewed the Report and Recommendation, the Defendants' Objections, the Government's Response to those Objections, the Defendants' Reply and the papers and exhibits filed before Magistrate Judge Bandstra. Based upon this *de novo review*, the Court adopts and affirms the well reasoned analysis of Magistrate Judge Bandstra which found no merit in the Defendants' claim that

the double jeopardy clause of the Fifth Amendment bars the prosecution of the instant money laundering offenses.

The court now turns to the defendants' claim that the doctrine of collateral estoppel requires the dismissal of the money laundering offenses, the striking of the overt acts relating to such offenses in Count I, and precludes the introduction of evidence of narcotics trafficking or acquisition of proceeds from such trafficking after 1980. The Court agrees with Magistrate Judge Bandstra's analysis of the applicable law and the record in case 91-6060. In that case, the defense had three principal thrusts. One thrust was the lack of sufficient credible evidence to support each element of the charges in the indictment beyond a reasonable doubt. Another thrust was that the defendants had ceased any narcotics activity after 1980. This thrust was a hybrid of the first and third thrust. It was not so much an affirmative defense as it was a particularized expansion of the insufficiency of the evidence argument, but it laid the foundation for the third thrust. The third thrust was the five year statute of limitation defense that the defendants could not be found guilty of their narcotics importation or distribution activities occurred solely before April 10, 1986. Underlying these three thrusts, was the argument that government's conduct in the case was so egregious that a jury which cared about justice could not return a verdict of guilty.

After reviewing the exhibits filed in this record, the Court concurs that it is not clear which defense

provided the basis for the acquittal. Interestingly, the testimony of juror Braswell who testified in the trial of the jury foreman, although not dispositive, suggests that the jury considered a myriad of factors, rather than relying on one issue in deciding to acquit. Applying the *Brown* analysis, the Court finds that the Defendants have not established by clear and convincing evidence that the cessation of the Defendants' drug trafficking activities after 1980 was the sole rational basis for their acquittal. Therefore, the Defendants have not satisfied the first prong of the *Brown* test.

Even assuming the acquittal rested on the statute of limitations defense, which meant that the jury found the defendants did not traffic in cocaine after April 9, 1986, such finding would not preclude the finding that the defendants derived proceeds from their earlier trafficking activities much less that they used proceeds of anyone else's drug trafficking activities. The jury in Case No. 91-6060 was never asked to decide the issue of whether Defendant Falcon and Magluta laundered money derived from specified unlawful activity. To prove the elements of the money laundering charge, the government does not need to prove that the defendants own drug trafficking activities produced the proceeds used in the financial transactions. What the government must prove is that the proceeds used in the financial transactions were derived from narcotics trafficking and that the Defendants knew this was the source of the funds. Therefore, the Court concludes that for a jury to

return guilty verdicts on the money laundering counts in the Fourth Superseding Indictment would not be "rationally inconsistent" with the verdict of acquittal in Case No. 91-6060.

Defendants' Objections also seek to limit the introduction of evidence regarding the Defendants' prior narcotics trafficking activities. It is clear that the Defendants do not dispute narcotics trafficking activities prior to 1980. Thus the question is whether the acquittal in Case No. 91-6060 precludes the introduction of evidence of the defendants' participation in narcotics trafficking activities after 1980 because of the doctrine of collateral estoppel. The Government may offer evidence that relates to criminal conduct for which a defendant has been acquitted to support charges not decided by a prior acquittal when the evidence is relevant to an issue in the subsequent prosecution and is subject to a standard of proof lower than beyond a reasonable doubt. *United States v. Dowling*, 493 U.S. 342 (1990). To prove the money laundering charges contained in the Fourth Superseding Indictment, the Government must prove beyond a reasonable doubt that the Defendants conspired to conduct financial transactions knowingly using the proceeds of narcotics trafficking. Rule 404(b) evidence of other narcotics trafficking criminal conduct is subject to lower standard of proof than beyond a reasonable doubt. Such evidence would be relevant to establish the defendants' knowledge of the source of the proceeds used

in the charged financial transactions, thus it would be admissible under *Dowling*.

Finally, the Court concurs with Magistrate Judge Bandstra's finding that is unnecessary to reach the issue of the effect of the bribery conviction of the jury foreperson in Case No. 91-6060 on the double jeopardy or collateral estoppel claims raised in this case. Therefore it is

ORDERED that the Report and Recommendation of Magistrate Judge Ted Bandstra is affirmed and adopted by this Court, it is further

ORDERED that Defendants' Joint Motion to Dismiss on Double Jeopardy and Collateral Estoppel Grounds is DENIED.

DONE AND ORDERED in Miami, Florida this 29th day of November, 2000.

/s/ Patricia A. Seitz
PATRICIA A. SEITZ
UNITED STATES
DISTRICT JUDGE

Copies to The Honorable Ted E. Bandstra
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-16473-bb

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SALVADOR MAGLUTA,
a.k.a. Sal,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Aug. 5, 2008)

Before: ANDERSON, CARNES and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT
JUDGE